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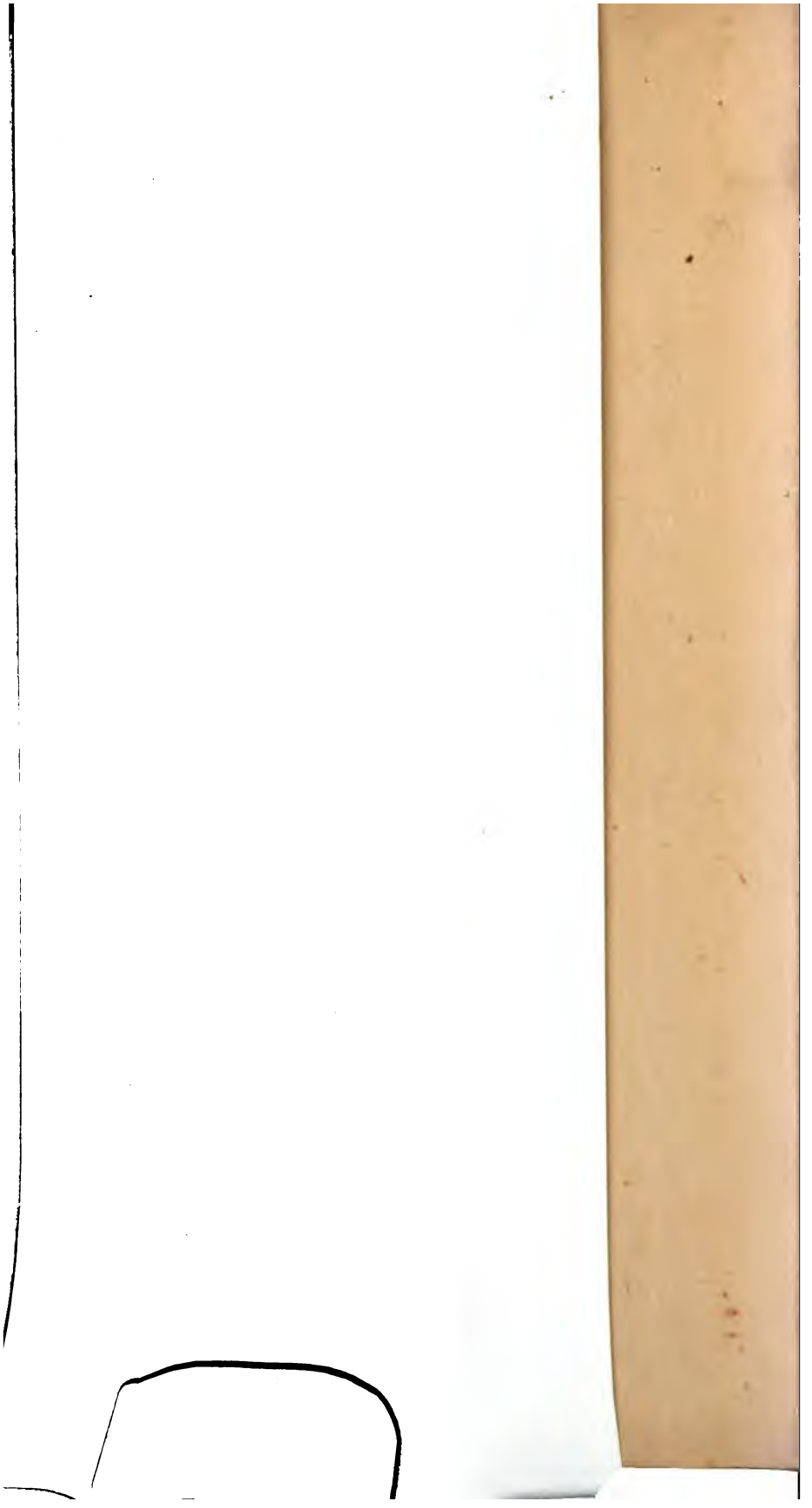
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A TREATISE

ON THE LAW OF

BUILDING AND BUILDINGS;

ESPECIALLY REFERRING TO

BUILDING CONTRACTS, LEASES, EASEMENTS, AND LIENS,

CONTAINING ALSO

VARIOUS FORMS USEFUL IN BUILDING OPERATIONS,
A GLOSSARY OF WORDS AND TERMS COMMONLY
USED BY BUILDERS AND ARTISANS,

AND A

DIGEST OF THE LEADING DECISIONS ON BUILDING CONTRACTS
AND LEASES IN THE UNITED STATES.

BY

A. PARLETT LLOYD,

OF THE BALTIMORE BAR,

AUTHOR OF "A TREATISE ON THE LAW OF DIVORCE."

SECOND EDITION, REVISED AND ENLARGED.

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PREFACE TO THE FIRST EDITION.

POSSIBLY the most remarkable omission in the literature of law in this country is the absence of any work upon Buildings, Building Contracts, and Leases. The subject is one of great importance, not only to the legal profession, but to fully three fourths of the general population, who are interested in building operations, whether as purchasers, architects, artificers, or contractors. Numerous books have appeared from time to time containing theoretical, historical, and artistic views of architecture and the art of building, but no American writer has yet compiled the building laws of our country to any practical extent.[1]

The object of this treatise is to fill this long-felt want; and if the design of the author is but partially realized, he will have the consciousness of at least having pointed out the general principles of this branch of the law. To accomplish his purpose, he has diligently compiled and compared both the English and American authorities; preparing his text directly from judicial determinations, strenuously avoiding all "speculations" as to the law. He has also endeavored to state all propositions as briefly and concisely as is consistent with clearness.

[1] Mr. Alfred Emden, of the Inner Temple, London, has an excellent work upon this subject, a second edition of which has appeared. His citations, however, are restricted to English decisions, and embrace many Acts of Parliament which are not applicable to this country. A still more recent English work, of larger compass than this one, is that of Mr. Hudson.

Building operations are essentially so complicated, involving the obligations and duties of several distinct professions, that it is a conceded folly for one of the laity to make a contract for building a house without seeking legal advice. Yet instances are frequent of persons becoming financially wrecked by entering into building contracts the technical stipulations of which they did not understand. So common has become the evil consequences of this lack of prudence, that many persons decline to entertain the idea of building, and have learned by experience the truth of the sage advice of Kett, who says: "Never build before you are five-and-forty; have five years' income in hand before you lay a brick; and always calculate the expense at double the estimate."

While the plan of consulting a lawyer before entering into such a transaction is always advisable, it is nevertheless an unquestioned fact that attorneys sometimes omit, or wrongly state, important provisions. Many instances could be cited where legal lights have unintentionally transformed proper contracts into faulty ones, leading to legal complications and the usual consequences thereof. By such mistakes a lawyer not only injures his client, but smirches his own reputation. Yet, had he earnestly desired to post himself especially upon this peculiar branch of the law of contracts, he would have looked in vain for a satisfactory treatise.

The subject of Building Leases also has not received that amount of attention by text-writers that its importance deserves, while Building Easements have never yet been specially treated. "Mechanic's Liens" have, however, received the lucid exposition of Mr. Phillips in the form of a special treatise, and also of Mr. Jones in his general work on Liens. But it is believed

that a short general treatment of the fundamental principles of mechanic's lien law will be acceptable as a valuable reference.

The works of Washburn on Easements and Real Property, Phillips on Mechanics' Liens, Emden on Building Contracts, etc., Wood on Nuisances, Thompson on Nuisances, Smith on Negligence, and Cooley on Torts have been freely consulted by the writer in the preparation of this treatise.

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PART I.

BUILDING CONTRACTS.

CHAPTER I.

THE NATURE OF BUILDING CONTRACTS GENERALLY.

§ 1. BUILDING CONTRACT DEFINED. A contract is an agreement between two or more persons, for a valuable consideration, to do or not to do some particular thing; and when the undertaking refers to constructing, erecting, or repairing an edifice or other work of structure, it may be called a building contract. The word "building" has a broad meaning, including as it does not only architectural structures, but all places erected for the habitation of man or beast, or for sheltering property, and applies to edifices, monuments, etc., whether designed for ornamental or useful purposes. It includes churches,[1] schoolhouses, and shops of all description,[2] stables,[3] sheds,[4] mills and manufactories,[5] boats and wharves, in fact any edifice or structure erected upon land or water by man.[6]

§ 2. VERBAL AND INFORMAL CONTRACTS. By the Statute of Frauds[7] certain simple contracts are required

[1] Presbyterian Church *v.* Allison, 10 Pa. 413.
[2] Shattel *v.* Woodward, 17 Ind. 225; Pratt *v.* Seavey, 41 Me. 370.
[3] McIlvain *v.* Hestonville & M. R. R. Co., 5 Phila. 13.
[4] Truesdell *v.* Gay, 13 Gray, 311.
[5] Coddington *v.* Dry Dock Co., 31 N. J. L. 477.
[6] Ibid.
[7] The Statute of Frauds, 29 Car. II., c. 3, sec. 4, enacts that no action

to be in writing to entitle them to enforcement at law. The second of these provisions causes much difficulty in building contracts. Whether the agreement was merely collateral depends on the intention in each case.[1] The fourth provision seldom applies.[2] The

shall be brought (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made in consideration of marriage, (4) or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The seventeenth section enacts that no contract for the sale of any goods, wares, or merchandise for the price of £10 sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

[1] A promise by the owner of a house to a sub-contractor to pay the amount due him from the principal contractor for work done on the house, if the sub-contractor would not file a lien, is within the statute, there being no agreement that the principal contractor should be discharged. Clark *v.* Jones, 85 Ala. 127, 4 So. R. 771. But where the person supplying lumber was about to cease deliveries, fearing the insolvency of the contractor, and the owner of the building promised to pay for the lumber, the agreement was held to be not within the statute. Sext *v.* Geise, 80 Ga. 698, 6 S. E. R. 174. It must depend upon the understanding of the parties in each case. Cf. Wiggins *v.* Guthrie, 101 N. C. 661, 7 S. E. R. 761; Yeoman *v.* Mueller, 33 Mo. App. 343; Bayles *v.* Wallace, 10 N. Y. Suppl. 191; Stoelker *v.* Chicago Building Supply Co., 22 Ill. App. 625; Dirringer *v.* Moynihan, 10 N. Y. Suppl. 540; Hagadorn *v.* Stronach Lumber Co., 81 Mich. 56, 45 N. W. R. 650; Preston *v.* Zekind, 84 Mich. 641, 48 N. W. R. 180; Green *v.* Soloman, 80 Mich. 234; Lindsay *v.* Heaton, 27 Neb. 662; Parkes *v.* Stafford, 16 N. Y. Suppl. 756; Warner *v.* Willoughby, 60 Conn. 468, 22 Atl. R. 1014; Parker *v.* Dillingham, 129 Ind. 542, 29 N. E. R. 23; Riegelman *v.* Focht, 141 Pa. 380; Brant *v.* Johnson, 46 Kan. 389.

[2] But a contract to make plans and superintend construction may be void because the agreement is bilateral and the other party's contract is to convey land. Koch *v.* Williams (Wis.), 52 N. W. R. 257.

fifth provision does not apply to a building contract unless the performance of its conditions is necessarily to be deferred for a year.[1] It is usually construed as an entire contract for work and materials, and not for the sale of goods.[2]

In cases where the intention of the parties was evidently to enter into a written contract, but the memorandum or draft or agreement was not signed by both or either of them, circumstances may arise whereby it may be inferred from the action of the parties that each of its stipulations should be held binding upon both. But the conduct of the parties where only a preliminary agreement has been entered into, though the intention was clear that a more formal contract was subsequently to be signed, must be such as plainly indicates a waiver of the formality of signing, or the court will refuse to decree specific performance or give damages for the breach.[3] A building contract will not be inferred from mere assent, unless the assent be acted upon. The law raises a presumption to pay for any work ordered or accepted,[4] and the liability of the contractor or sub-contractor does not relieve the proprietor from responsibility.[5] Yet the burden of proof lies upon the party setting up an informal contract to show that both parties acted upon it.[6]

[1] Holmes *v.* Shands, 26 Miss. 639; M. & M. Sav. Bank *v.* Dashiell, 25 Gratt. 616; Plimpton *v.* Curtiss, 15 Wend. 336. A contract of building was wholly performed within a year, and, though the payment was to be in part in yearly instalments, the statute was held not to apply. Durfee *v.* O'Brien (R. I.), 14 Atl. R. 857.

[2] Lee *v.* Griffin, 1 B. & S. 272; Clay *v.* Yates, 1 H. & N. 73.

[3] Wood *v.* Silcock, 50 L. T. 251, 32 W. R. 845.

[4] Holmes *v.* Shands, 26 Miss. 639; Hazard Powder Co. *v.* Loomis, 2 Disney (Cin.), 545.

[5] Gilman *v.* Gard, 29 Ind. 291; Blount *v.* Guthrie, 99 N. C. 93.

[6] Preston *v.* Luck, L. R. 27 Ch. D. 497; Wood *v.* Silcock, 50 L. T. 251, 32 W. R. 845.

§ 3. WRITTEN CONTRACTS. Building agreements are almost invariably reduced to writing. Great care should always be exercised in the preparation of these contracts. The contingencies to be provided for, the technicalities of many branches of the builder's trade, and the numerous stipulations as to quantities and qualities of materials, as to extras, alterations, etc., are confusing, besides which there are many important factors apt to be overlooked.[1]

In the construction of building contracts, as in all others, the court will endeavor to discover the intention of the parties. The rigid rule obtains that a written contract, whether simple or under seal, cannot be varied by parol evidence. Where specifications are attached to a building contract, all provisions or contemporaneous agreements as to changes in the former are merged in the latter.[2] The meaning of particular phrases, technical words, and provincialisms may be explained by parol testimony.[3] Where, however, the

[1] Forms of Building Contracts will be found in the Appendix.

[2] See Ch. VIII.

[3] A condition to a written agreement with an architect, that the agreement is to depend upon the other party's obtaining a loan for the erection of the building, cannot be shown by parol evidence. Marquis *v.* Lauretson, 76 Iowa, 23, 40 N. W. R. 73.

[4] Ford *v.* Beech, 11 Q. B. 866. *Construction and Interpretation.* A contract to furnish brick at so much per thousand "actual count of brick in said walls" means that the bricks must be counted individually, and not according to conventional cubic measure. Lester *v.* Pedigo, 84 Va. 309, 4 S. E. R. 703. Where a contract provides that, in the event of cancellation, the contractor shall be paid for "labor done and materials furnished up to date of such cancellation," the recovery for materials should include, in case of cancellation, materials merely procured or prepared, as well as materials actually delivered. Dickinson *v.* Gray (Ky.), 8 S. W. R. 876. For the meaning of "exterior walls," in a contract to face such walls with special quality of brick, cf. Ittner *v.* St. Louis, etc. Assoc., 97 Mo. 561, 11 S. W. R. 58. The term "excavating," where rock is unexpectedly discovered, does not include blasting the rock. Hellwig *v.* Blumenberg, 7 N. Y. Suppl. 746. An agreement to build "in the best, most substantial, and workmanlike

meaning of the words is clear, or there is an apparent effort to give other meanings than those well understood, the court will not allow parol evidence.[1] The parties may of course verbally rescind written provisions,[2] or may agree upon an extension of time for the performance of a written contract.[3]

§ 4. The Mutuality of the Contract. The law presumes that he who undertakes a building contract is competent to fulfil its stipulations. It further imposes upon him the duty of executing his work with diligence and care. The builder's duty is faithfully to carry out the plans put into his hands in strict accordance with the stipulations of the contract. He may assign different parts of the work to sub-contractors and others, unless prohibited by the agreement,[4] but he is responsible for those he employs. On the other hand, if part of the work is to be performed by the employer or his agents, the law presumes that he also will see that his part of the contract is diligently performed, and that he will not impede the other in any manner.

If the employer fails to perform, he is liable to the

manner," with a clause allowing rescission for non-performance, justifies rescission where the contractor and his workmen are dissipated and grossly ignorant of their duties. Rector *v.* McDermott (Ark.), 13 S. W. R. 334.

Other terms construed according to the circumstances of the contract are: "Sash," as not including glass. Smith *v.* Collins, 58 Hun, 608, 12 N. Y. Suppl. 53. "Knots" in flooring. Rush *v.* Wagner, 12 N. Y. Suppl. 2. "Rock excavation," to include loose as well as solid rock. Dhrew *v.* City of Altoona, 121 Pa. 401, 15 Atl. R. 636. "On and around the site:" a contract to deliver this is not satisfied by delivering at a corner of the site. McGowan *v.* U. S., 21 Ct. Claims, 476.

[1] Myers *v.* Sarl, 30 L. J. Q. B. 9, 3 E. & E. 306; Mallan *v.* May, 13 M. & W. 517.

[2] See § 33.

[3] See § 38.

[4] Robson *v.* Drummond, 2 B. & Ad. 308; Wentworth *v.* Cock, 10 A. & E. 45.

builder or contractor to the extent of the damage his failure has caused; and the contract price, less any damages incurred by the contractor, is the measure of damages in such cases. While the law implies that work shall be done in a workmanlike manner, it also requires the employer to keep his part of the work advanced by furnishing materials as promptly as desired. It has even been held that, if a contractor is prevented from completing his job by the unwarranted acts and defaults of the other party, he may sue upon the contract and claim damages, or he may waive the contract and sue for what his work is reasonably worth: he is not restricted to a *pro rata* share of the contract price.[1] On the other hand, the owner is entitled to receive as damages the value of the use of the building for the time its completion is unreasonably delayed.[2] It is always advisable, where there are several contracts for various portions of the work, to provide that the various parties give reasonable assistance to each other, as to scaffolding, bricklaying, etc.

§ 5. CONTRACTS WITH CORPORATIONS. While corporations ordinarily have power to contract as private individuals,[3] this privilege does not authorize the making of contracts of all descriptions, and permits only such as are necessary and usual or fit and proper to carry on the business for which the particular corporation was organized.

Chief Justice Taney declared that "it may be safely assumed that a corporation can make no contracts and do no acts, either within or without the State which

[1] On all these points, see Ch. IV.

[2] See Ch. V.

[3] Thompson *v.* Lambert, 44 Iowa, 239; Barry *v.* Merchants' Exch., 1 Sandf. Ch. 280; Brady *v.* Mayor, 1 Barb. 584, 20 N. Y. 312; Dillon on Munic. Corp. § 371.

creates it, except such as are authorized by its charter."[1] Yet the right to contract need not be *specially* stated, for it may be inferred; for instance, it has been held that a railroad company has an implied authority to erect refreshment rooms, although nothing concerning the same is contained in the charter.[2]

The control and management of corporations is usually vested in a president and a board of directors; and, where there is a majority of the latter present, a quorum is formed, and these officials can dictate the policy of the corporate body. Their action in forming contracts is usually evidenced by the seal of the corporation, and signatures of the president and secretary of the board. It is well settled, however, in the United States, that a corporation may make a contract without the use of its seal.[3]

In making building contracts with corporations, care should be taken (1) that the company is represented by the proper authorities;[4] (2) that its seal is affixed;

[1] Bank of Augusta *v.* Earle, 13 Pet. 519.

[2] Flanagan *v.* Great West. Ry. Co., L. R. 7 Eq. 116.

[3] Bank of Columbia *v.* Patterson, 7 Cranch, 299; Fleckner *v.* Bank of U. S., 8 Wheat. 338; McCullough *v.* Talladega Ins. Co., 46 Ala. 376; Merrick *v.* Burlington & Warren Plank Road Co., 11 Iowa, 75.

[4] In Lyndon Mill Co. *v.* Lyndon L. & B. I., 63 Vt. 581, 22 Atl. R. 575, the president of a "Literary and Biblical Institute" was found to have no implied authority to purchase lumber for repairs. See, also, Cunningham *v.* M. S. & F. C. R. Co., 63 Hun, 439, 18 N. Y. Suppl. 600. A committee was appointed by the directors of a corporation to secure plans for the erection of a building, and, proposals for plans having been declined by builders because the right was reserved to reject any and all bids, the committee changed the proposals, offering to accept the lowest bid. The committee were not in fact authorized to do this. Held, that they had ostensible authority to do so. McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. R. 245. In Parish *v.* Clarke, 74 Me. 110, where the parish had not voted to allow the committee to contract in its own name, and only one member of the committee had signed, it was held that the contract could not have been enforced had it not been ratified. Where a town has appropriated a certain amount for a building, and ap-

(3) that the character of the work to be performed is within the province of the corporation, or can reasonably be implied from its charter.[1] For instance, it has been held that where a railroad company contracted to build cottages, and the contract was informal, the corporation was not bound thereby.[2] But when the work was necessary, and has been fully performed, the corporation can be held responsible.[3]

A contract with a corporation, entered into without proper authority, may be expressly ratified by the company,[4] or sometimes by simple acceptance of the work.[5]

§ 6. INFANCY. Materials furnished for erecting a house on the vacant land of an infant are not necessaries.[6]

points a committee to expend the appropriation, the committee has no authority to increase the amount. Turney *v.* Bridgeport, 55 Conn. 412.

The proper formalities must be observed in reaching a decision where a committee of a corporation is in charge. Eigemann *v.* Board, 82 Ind. 413 (where it was said that joint action as a board was necessary); Howard *v.* School, 78 Me. 230 (where the majority of members did not concur). The mere appending of the title of an office held by persons ordering the work of construction is not sufficient to make the act one of agency or to bind other persons than the signers. Sharp *v.* Smith, 32 Ill. App. 336 (where the signers wrote "School Directors" after their names); Fullam *v.* West Brookfield, 9 Allen, 1 ("Committee for the Town"). *Contra*, Haight *v.* Sahler, 30 Barb. 218.

[1] A church society, unless incorporated, cannot be sued on a building contract. Wilkins *v.* Wardens, etc., 52 Ga. 315.

[2] Crampton *v.* Varna Ry. Co., L. R. 7 Ch. 562, 41 L. J. Ch. 817; Frend *v.* Dennett, 4 Jur. N. S. 897.

[3] Clark *v.* Cuckfield Union, 1 Bail. C. C. 81, 16 Jur. 686.

It has even been held that, where the provision empowering the corporation to build was unconstitutional, the contractor might recover the value of the benefit conferred. Board of Prairie Lodge *v.* Smith, 58 Miss. 301, 308; Morawetz on Corporations, §§ 694, 760, 742, 744; Thompson on Stockholders, §§ 407–414.

[4] Smith *v.* Hull Glass Co., 11 C. B. 897, 21 L. J. C. P. 106; Reuter *v.* Electric Telegraph Co., 6 E. & B. 341, 26 L. J. Q. B. 46.

[5] Houldsworth *v.* Evans, 37 L. J. Ch. 752, 793, 800.

[6] Wornock *v.* Loar (Ky.), 11 S. W. R. 438.

CHAPTER II.

ARCHITECTS AND SUPERINTENDENTS.

§ 7. THE ARCHITECT is the recognized head of the building trade. He is supposed to be especially skilled in the art of planning and designing architectural structures of every description. His duty is to draw plans and make out specifications, and generally superintend the execution of the work. He is required to possess not only great artistic skill in designing, but a practical knowledge of all the details of building. He is generally required to furnish, in addition to the general design, working drawings to guide the artificers in constructing the building. To prepare proper specifications requires thought and learning, for he must be familiar with the qualities and strength of materials, the weight of structures, and the relationship of the various operations to be performed by the many trades represented in the building. A person following the occupation of forming plans, drawings, and specifications for building purposes, representing himself as an architect, is presumed in law not only to be such, but to be learned in the profession.[1] The best way of showing his competency by evidence is to prove that he acted as other competent architects would have done.[2]

[1] Harmer *v.* Cornelius, 5 C. B. N. S. 236, 28 L. J. C. P. 85.

For the qualifications necessary for an architect called upon as an expert in building litigation, cf. Chamberlain *v.* Dunlap, 8 N. Y. Suppl. 125.

[2] Chapman *v.* Walton, 10 Bing. 63, 3 M. & Scott, 389.

Architects are usually considered the chief of all persons engaged in the building, for their professional standing depends upon the success of their undertaking, and even their employer cannot with propriety interfere during the progress of the work.

It has been held in England that the contractor shall build according to the plans for the price agreed upon, but the architect may order any additions or alterations that he pleases, either before or after any of the work is done, without consulting the employer; and, even though the latter may object to the alterations, he shall also pay the architect a further percentage for designing the same.[1] Such a rule, establishing as it does an arbitrary despotism for architects, has not been upheld in this country.[2] By virtue of usurped authority by architects, many an English gentleman has laid the foundation of his ruin with the foundation of his house, and for the same reason the houses of Parliament were made to cost six times their original estimate.[3]

§ 8. AGREEMENTS WITH ARCHITECTS.[4] Formerly, in England, when no agreement was made with an architect, he received five per cent. on the cost of the structure, and two and one half per cent. for his plans and superintendence. In 1862 a professional institution of architects issued a scale of charges, all on the percentage system; but in 1870 the Court of the Exchequer declared that this code of the profession was not binding, as its charges were unreasonable: and it was held "contrary to good sense and justice," and not a

[1] Becket's Building, p. 17.
[2] See Adlard *v.* Muldoon, 45 Ill. 193.
[3] Becket's Building, p. 20.
[4] A form will be found in Appendix.

legal standard.[1] The architect is usually paid, in Great Britain, one half on signing the contract, and the balance in instalments as the work progresses.[2]

There is no fixed rule as to compensation of architects in the United States; and in cases where the amount is not stipulated there will be allowed reasonable pay for their services, taking into consideration their professional character and all attending circumstances.[3]

The contract with the architect should contain a stipulation that he is not entitled to any extra compensation unless agreed upon in writing, or previously approved by the employer. Such a provision will be rigidly enforced.[4] Where the work is to be performed under the direction of an architect to be appointed by the employer, the appointment of the architect is a condition precedent, and, if not made within a reasonable time, the builder is released.[5] The contract should fully set out the authority of the architect, to avoid many vexatious disputes and legal complications. It

[1] Eddy *v.* McGowan, cited by Becket as decided November 17, 1870, but not reported in the Law Reports. See Rules of British Royal Society of Architects, and American Institute of Architects, Appendix, *post.*

[2] Emden Build. Con. 105.

[3] A contract for compensation based on "estimated cost" means the reasonable cost of the buildings as constructed according to the specifications agreed on; it is not necessary that some contractor's bid should have been accepted by the owner. Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. R. 219. Where separate plans were offered by several architects, and, before the choice was made, the competitors agreed that all should share in the compensation, whichever plan was adopted, the contract was held to have been made upon sufficient consideration. Flanders *v.* Wood, 83 Tex. 277, 18 S. W. R. 572. For cases in which the court adopted a specific percentage as customarily settled by the profession, see Knight *v.* Norris, 13 Minn. 473; Gilman *v.* Stevens, 54 N. Y. P. R. 197.

[4] Baltimore Cemetery Co. *v.* Coburn, 7 Md. 202; Abbott *v.* Gatch, 13 Md. 314.

[5] Coombe *v.* Greene, 2 Dowl. N. S. 1023, 11 M. & W. 480, 12 L. J. Ex. 291; but see Green *v.* State, 8 Ohio, 310.

should definitely state that, should alterations be desirable, they must be subject to new agreements. His compensation should be stipulated; for the experience of all persons who have been observant teaches that things valued after having been furnished, or left discretional and dependent upon the honesty of the other party, always come much higher than where no understanding is had in the beginning. An agreement with an architect need not be in writing, unless the services are not intended to be performed within one year.

§ 9. The architect's contract does not survive to his representative.[1] If there is a contract to complete certain work for a certain sum, the representative of a deceased architect cannot recover for the part performance.[2]

§ 10. PLANS AND DRAWINGS. Architects are either engaged by the owner and projector of the building or his contractor, or selected after competition. The latter method is usual in constructing churches, public buildings, etc., where it is desirable to procure several designs from which to select. An advertisement in a newspaper, or a special request to various architects, is the general method of securing competitors. It should always be clearly understood that the drawings, etc., are subject to approval, for otherwise the party receiving them will be liable for their value whether used or not.[3] Where A drew plans for a building at B's request, and C called for them and estimated upon them for B, but B concluded not to build by them, it was nevertheless held that he was liable

[1] Hall *v.* Wright, E., B. & E. 765, 29 L. J. Q. B. 43; Taylor *v.* Caldwell, 3 B. & S. 835.

[2] Stubbs *v.* Holywell Ry. Co., L. R. 2 Ex. 311, 36 L. J. Ex. 166. See Appeal of McDaniel (Pa.), 12 Atl. R. 154.

[3] Nelson *v.* Spooner, 2 F. & F. 613.

to A for drawing the plans.[1] If, on the other hand, he is given to understand that his plans are to be considered "probationary," he will have no cause of action unless they are accepted.[2] So, also, where he renders service conditionally, or undertakes a contract which he knows will be of no value whatever to his employer, he is not entitled to compensation.[3]

Where an architect recommended building a structure upon soil which he had examined, and which his knowledge of such things should have told him was unsuitable for the purpose, even the acceptance of his plans did not render the employer liable.[4]

In an action by an architect whose plans, after having been accepted, are rejected on the ground that the work cannot be done for the amount of his estimate, it seems that it is a question for the jury whether the bids of the contractors are reasonably near the architect's estimate.[5]

[1] Kutts *v.* Pelby, 20 Pick. 65.

[2] Moffatt *v.* Dickson, 22 L. J. C. P. 265, 13 C. B. 543.

[3] Addison on Contracts, 678; Moneypenny *v.* Hartland, 1 C. & P. 352; Whitty *v.* Lord Dillon, 2 F. & F. 67. Where the acceptance of plans was on condition that a reliable bid should be "received" for the construction, "received" was held not to include acceptance by the owner. Hall *v.* Los Angeles Co., 74 Cal. 502, 16 Pac. R. 313. In Walsh *v.* St. Louis Expos. etc. Assoc., 101 Mo. 534, 14 S. W. R. 722, it was held that on the facts of the case the acceptance was conditional only. An offer of prizes for plans, and of the position of superintendent of construction "if successful," means that the person presenting the plan accepted as best will be appointed superintendent. Walsh *v.* St. Louis Expos. etc. Co., 90 Mo. 459, 2 S. W. R. 842. A vote by a committee to adopt a certain one of several competing plans, subject to modifications to be determined, and provided the cost estimate is verified, is not such a final acceptance as establishes the contract. Tilley *v.* Cook Co., 13 Otto, 155. For other cases of an acceptance not effective because conditional or qualified, see Ada St. Church *v.* Garnsey, 66 Ill. 132; Allen *v.* Bowman, 7 Mo. App. 29; Boyle *v.* Desenbery, 74 Mich. 79.

[4] Whitty *v.* Lord Dillon, *supra*.

[5] Nelson *v.* Spooner, 2 F. & F. 613. For articles on the ownership of

The obligation of paying for the drawings of an architect usually rests on the employer, not on the mechanics who make use of them.[1]

§ 11. ARCHITECT THE AGENT OF THE EMPLOYER. The relation of principal and agent is formed where the architect acts for the proprietor in superintending the construction of a building.[2] His appointment implies authority to adopt all proper or necessary means to accomplish the primary object for which he is engaged. It has been held in England that an architect can make a valid contract binding upon his employer for completing a house, although no such contract is comprehended in the terms of the agreement.[3] Such a rule has not been laid down in the United States, for the reason that it would give an architect the power of making money out of the trust reposed in him, and it is well settled that an agent has no right to use his fiduciary authority for his own special benefit.[4] So an agent appointed to settle a debt cannot purchase it;[5] nor an engineer enter into a sub-contract with the con-

drawings, see the Journal of the Royal Institute of British Architects for 1892, where Mr. Wyatt Papworth has a series upon the subject at pp. 169, 188, 231, and 254. In one of these is given an opinion rendered by Messrs. Manisty and Bowen, Q. C. (since appointed justices), in answer to a request by the Council of the Institute. This opinion is published in 38 American Architect, 11. See the same volume (38), at pp. 45, 182, for an account of the discussion of the subject in Europe and America up to date. See, also, 34 Amer. Arch. 109.

[1] Webb *v.* School, 3 Phila. 125. As to the measure of damages for failure by a carrier to deliver plans intended for a competition, see Watson *v.* Ambergate, 15 Jurist, 448; Adams Express Co. *v.* Egbert, 36 Pa. 360.

[2] Kimberly *v.* Dick, L. R. 13 Eq. 1.

[3] Hall *v.* Holt, 2 Vern. 322, 3 P. Wms. 223; Wyatt *v.* Marq. Hertford, 3 East, 147.

[4] Wharton on Agency, § 231.

[5] Reed *v.* Mory, 2 Myl. & Cr. 361; Comstock *v.* Comstock, 57 Barb. 453; Knabe *v.* Tornot, 16 La. Ann. 13.

tractor unknown to the principal.[1] Any attempt to appropriate special profits from his employment is fraudulent.[2] A secret agreement for a fee from the builder justifies the owner in discharging the architect without pay.[3] Such a contract is void.[4] So if an architect and his employer enter into a secret agreement to the detriment of the builder,[5] as where the architect agrees to allow the proprietor the benefit of matters he was to arbitrate.[6] Such agreements will not be upheld by the courts. He is entitled to no other profit from his transactions in his employer's behalf than the agreed compensation or reasonable fees. The usual rules applicable to a special agency govern according to the circumstances.[7]

As a principal is responsible for the acts of his agent done within the scope of his authority, upon the general principle *Qui facit per alium facit per se*, so also the employer is liable for the acts of his architect in pursuance of authority given him. The relationship is one of employer and employee.[8] The owner of the building may therefore be made liable for the negligence of his architect in superintending the construction.[9] Although he may possibly not be responsible for negli-

[1] Smith *v.* Sorby, 3 Q. B. D. 552.

[2] Mason *v.* Bauman, 62 Ill. 76.

[3] Tahrland *v.* Rodier, 16 Low. Can. R. 473.

[4] Atlee *v.* Fink, 75 Mo. 100. But see Legg *v.* Dunleavy, 80 Mo. 558, where in an action of libel it was held that a builder, who had declared that an architect had contracted with him for a commission as the condition of giving the contract, was not guilty of libel.

[5] Kemp *v.* Rose, 1 Giff. 258; Kimberly *v.* Dick, L. R. 13 Eq. 1, 41 L. J. Ch. 38.

[6] Scott *v.* Corporation, 3 De G. & J. 334, 28 L. J. Ch. 230.

[7] Baines *v.* Ewing, L. R. 1 Ex. 320.

[8] Brown *v.* Acrington Cotton Co., 3 H. & C. 511 (building originally badly built).

[9] Weger *v.* Penn. Ry. Co., 55 Pa. 460.

gently employing an incompetent person, he is certainly bound for their acts if he retains them after notice.[1]

§ 12. Power of Architects. In properly drawn contracts, the authority of the architect is specially prescribed.[2] Where his powers are fully set out, he will not be allowed to transcend them. In the absence of stipulations to the contrary, his authority as a general agent would be measured by the object of his employment; he could adopt all proper or reasonable means to carry out the intention of his employer.[3]

He cannot delegate his authority. The legal maxim, *Delegata potestas non potest delegari*, applies, prohibiting delegated power from again being delegated. An architect has not the right to substitute another person in his stead.[4] But a special permission can confer this right, as by express terms of substitution contained in the contract.[5] His position is one involving special trust and confidence in his skill, and if he were permitted to assign his duties to a third person, whose ability and integrity may not be known to the employer, a great injustice might be done to those who had exercised diligence in the original selection.[6]

[1] This, however, is disputed. For instance, in a Connecticut case, the defendant was employed to build a dam and to superintend the work; it was held that he was not a servant. Corbin *v.* American Mills Co., 27 Conn. 274.

[2] See form in Appendix.

[3] Richardson *v.* Anderson, 1 Camp. 43, *n.*; Johnston *v.* Kershaw, L. R. 2 Ex. 82; Robinson *v.* Mollett, L. R. 7 H. L. 802.

[4] Combe's case, 9 Co. R. 75; Powell *v.* Tuttle, 3 Comst. 396; Bocock *v.* Pavey, 8 Ohio St. 270.

[5] Com. Bank *v.* Norton, 1 Hill, 505.

[6] Combe's case, 9 Co. R. 75; Emerson *v.* Providence Hat Co., 12 Mass. 241; Tibbetts *v.* Walker, 4 Mass. 597; Lynn *v.* Burgoyne, 13 B. Mon. 400. For the architect's responsibility for over-certification as to work done, see Irving *v.* Morrison, 27 Up. Can. C. P. 242. As to how far the architect is bound to give diligence in the inspection of the work, in order to fulfil his obligation to the owner, see Petersen *v.* Rawson, 34 N. Y. 370;

When he can bind his principal. Where he exercises authority reasonably implied from his appointment, he may bind his employer; as where an architect engaged a surveyor to measure quantities, the latter is entitled to recover from the former.[1] If a loss arise for the want of skill or diligence, and the employer exercise due care in his selection, the architect alone is liable; so if in dealing with third persons he neglects to disclose his principal.[2] So, also, if he acts without authority, or makes false representations as to his position;[3] as where an architect represented to a builder that he had authority to order certain work and materials, and had no such authority, he was held personally liable for their value.[4] The architect or engineer has in general no power to waive or alter the terms of the plans, or any part of the building contract.[5]

The architect has no power to substitute other persons (*e. g.* sub-contractors) for those specified in the contract.[6]

Shipman *v.* State, 43 Wis. 381; Gilman *v.* Stevens, 54 N. Y. Pract. R. 197.

[1] Moon *v.* Guardians, 3 Bing. N. C. 817; Mayor of Baltimore *v.* Eschbach, 18 Md. 276.

[2] 2 Kent's Com. (7th ed.) 830, notes.

[3] Lewis *v.* Nicholson, 18 Q. B. 503, 21 L. J. Q. B. 311.

[4] Randall *v.* Trimen, 18 C. B. 786, 25 L. J. C. P. 307.

[5] Jones *v.* Queen, 7 Can. S. C. 570; Woodruff *v.* Rochester, etc. R. Co., 108 N. Y. 39. See § 54; Burke *v.* Kansas City, 34 Mo. App. 570; Bonesteel *v.* Mayor, 22 N. Y. 162; Bond *v.* Newark, 19 N. J. Eq. 376; Adlard *v.* Muldoon, 45 Ill. 193. An architect who had a contract for doing the plastering was held to have no authority to have the mortar carted from the place of making to the building, instead of having it made on the premises. McIntosh *v.* Hastings (Mass.), 31 N. E. R. 288. An architect whose duty it is to superintend construction is not an agent of the owner to receive notice of an assignment by the contractor of amounts due to him under the contract. Renton *v.* Monnier, 77 Cal. 449, 19 Pac. R. 820.

[6] Bouton *v.* Supervisors, 84 Ill. 384; Campbell *v.* Day, 90 Ill. 363. For cases construing the extent of an architect's powers under the circum-

Joint Liability. It is frequently found advisable, where there is a doubt as to the architect's power to bind his principal, to join both the principal and the architect in the suit as parties defendant, so that, in the event that the architect acted within the scope of his authority, the principal will be held; while, on the other hand, if his action was unauthorized, the architect will be personally liable.[1] An architect charged upon a contract or for any other act, upon his own personal liability, may serve upon his employer a notice to indemnify for that act, and thereby make him a party to the proceeding.[2] But where a house is defectively built in consequence of the joint neglect of the architect and the contractor, a suit for such neglect may be brought against the architect alone.[3]

stances of particular contracts, see Lewis *v.* Slack, 27 Mo. App. 119; Dodge *v.* McDonnell, 14 Wis. 253 (where an architect's promise to pay for some lime was held unauthorized).

[1] Honduras Ry. Co. *v.* Lefevre, L. R. 2 Ex. D. 301, 46 L. J. Ex. 391.

[2] Emden on Building, 113; Dugdale *v.* Lovering, L. R. 10 C. P. 196, 44 L. J. C. P. 197; Benecke *v.* Frost, L. R. 1 Q. B. D. 422.

[3] Newman *v.* Fowler, 8 Vr. (N. J.) 89. For a case where the architect was held responsible for the death of a workman employed on the building, see Lottman *v.* Barnett, 62 Mo. 159.

CHAPTER III.

CERTIFICATES OF APPROVAL BY ARCHITECTS AND OTHERS.

§ 13. GENERAL STATEMENT. It is usually found advisable to stipulate in the building contract that the work shall be approved upon completion by the architect or some other competent person, or that it shall be performed to the satisfaction of the proprietor of the premises. Building operations are essentially complicated, and there are consequently innumerable opportunities for imposition by the contractor, such as the use of defective materials, the employment of unskilled labor, and negligence of superintendence. When a party contracts for erecting a house, he agrees to pay for that which is not in existence at the time of the agreement, and it is but reasonable and just that the work to be performed should be subject to approval. Yet it would virtually check a great proportion of builders if they were obliged to wait until the completion of their entire undertaking before being paid. This objection is met by adopting the plan of paying a certain percentage as the work progresses, always taking care that enough will remain due to the builder upon completion of the structure to pay for any defects which may be discovered before the final payment.

§ 14. ARCHITECTS' AND SUPERINTENDENTS' CERTIFICATES. As I have said before, the architect is the natural and proper arbitrator of all disputes that may arise between the builder and the owner. He is supposed to be learned in his profession, and therefore thoroughly

conversant with all the details of the building art; besides, his reputation is dependent upon the perfect execution of his designs. It is recommended that the provision making his certificate necessary as a condition precedent to the payment of money be included in the contract whenever practicable.

§ 15. PART PERFORMANCE CERTIFICATES. It is also advisable to stipulate, where the work is executed under his general superintendence, that he should give "progress certificates" from time to time, indicating the progress of the building, that the owner may safely make advances to the builder.[1] Such certificates are for the benefit of the owner of the building, and he may waive them at his option and pay upon other proofs.[2] But if the contract specifies that payment shall only be made upon the procurement of the certificate, the contractor cannot sue the owner without complying with this condition,[3] unless the same be fraudulently or capriciously refused,[4] for the decision of a party passing upon work may always be impeached for fraud or mistake.[5] Where the contract especially provides for the approval of a third person, no right to money earned or cause of action accrues until that party's certificate is procured.[6]

"But the certificate of a superintendent, surveyor,

[1] Tharsis S. & C. Co. *v.* McElroy, L. R. 3 App. Cases, 1045. See definition by Lord Cairns. A stipulation that payments shall be made as the work progresses, on an architect's certificate, does not require the presentation of such a certificate to recover the balance due after completion. Braun *v.* Winans, 37 Ill. App. 248.

[2] Blethen *v.* Blake, 44 Cal. 117.

[3] Packard *v.* Van Schoick, 58 Ill. 79.

[4] Badger *v.* Kerber, 61 Ill. 328.

[5] 1 West. Rep. 380; Adams *v.* New York, 4 Duer, 295, 44 N. Y. 145, 11 Abb. Pr. (N. S.) 378, 1 Hilt. 388.

[6] Kirtland *v.* Moore, 1 Cent. Rep. 466.

or architect who, by the contract for any work, is to superintend its performance, and whose approval is required before any payment is due, cannot dispense with the performance of any substantial part of the contract, but may be binding as to the fact whether the work certified to was done in a workmanlike manner, or of proper materials of the kind required. For such a certificate would not make building a brick house a compliance with a contract to build one of marble. Nor would the fact that a house built of brick is substantially and for service as good or better than one of marble, make such a building a performance of the contract, upon being certified to be so."[1] So the certificate of a street commissioner as to certain work cannot dispense with the performance of any substantial part thereof.[2] So, also, the acceptance of a different class of work from that contracted for will not bind the owner.[3] Moreover, these certificates are provisional only, being intended merely as conditions precedent to the payment of instalments, and are subject to revision on the final adjustment.[4] Part payments are *primâ facie* implied waivers of the right to object to the portions of the work upon which the payments were made.[5]

§ 16. Arbitration and Award. When parties agree to submit the question to a third party as to what shall be done by the one to satisfy the claim of the other, a supplemental contract is formed, namely, the contract

[1] Bond *v.* Newark, 4 C. E. Gr. 376.

[2] Ibid.

[3] See 11 N. Y. Sup. Ct. 91, 67 N. Y. 563; Glacius *v.* Black, 50 N. Y. 145; Johnson *v.* De Peyster, 50 N. Y. 666, 4 Barb. 614, 35 Barb. 602.

[4] Tharsis Co. *v.* McElroy, *ante*. See Hartupee *v.* Pittsburgh, 97 Pa. 107; Crumlish *v.* R. Co. 5 Del. Ch. 270.

[5] Goldsmith *v.* Hand, 26 Ohio St. 101.

of arbitration and award,[1] and a submission thereto is valid and binding although there is no agreement that judgment shall be entered on the award.[2] Courts of equity will not compel specific performance of an agreement for submission; but when the award has once been made, it is held conclusive, unless impeached for fraud; and if either party refuses to abide by it, the other may resort to chancery for specific performance, or seek damages therefor in the common law courts.

§ 17. ARCHITECT AS ARBITRATOR. Upon the submission of the parties of the matter in controversy for the decision of the architect, the ordinary rules governing arbitration and award become applicable. The general principles of common law, together with the modifications by statutory enactments, regulate the matter as in other cases.

When it is stipulated in the contract that the decision of an architect "shall be final on all questions of difference arising under the contract," there can be no doubt that his power of arbitration is conclusive in the absence of fraud or mistake.[3]

In many cases, however, a less strict rule has been

[1] Steward *v.* Cass, 16 Vt. 663; Valentine *v.* Valentine, 2 Barb. Ch. 430.

[2] Howard *v.* Sexton, 4 Comst. 157; Yeamans *v.* Yeamans, 99 Mass. 585.

[3] Stevenson *v.* Watson, 4 C. P. D. 148; Downey *v.* O'Donnell, 86 Ill. 49, 92 Ill. 559; Finney *v.* Condon, 86 Ill. 76; Snell *v.* Brown, 71 Ill. 134; St. Paul, etc. R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. R. 1; Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. R. 984; Price *v.* Chicago, etc. R. Co., 38 Fed. R. 804; Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. R. 276; Wood *v.* Chicago, etc. R. Co., 39 Fed. R. 52; Rens *v.* Grand Rapids, 73 Mich. 237, 41 N. W. R. 263; O'Donnell *v.* Forest (La.), 11 So. R. 245; Lewis *v.* Chicago, etc. R. Co., 49 Fed. R. 708; Ross *v.* McArthur (Iowa), 52 N. W. R. 125; Guilbault *v.* McGreevy, 18 Can. S. C. 609; Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. R. 639; Tullis *v.* Jackson, 1892, 3 Ch. 441. In Price *v.* R. Co. and Sweet *v.* Morrison, *supra*, the arbitrator's acceptance of the erroneous reports of assistants was held immaterial. Cf. on this point Scoville *v.* Miller, 40 Ill. App. 237; Lewis *v.* Chicago, etc. R. Co., *supra*.

adopted by the courts. In a California case,[1] for example, where the contract stipulated that all disputes should be settled by the architect, but the parties refused to submit to his decision as to the amount due, and he did not act in the matter, it was held that his testimony was not conclusive, and "that it was competent for the plaintiff to show by other persons the extent of the deficiencies."

Other relaxations have been made, various tests being laid down. Gross mistake, it is said, may imply or be equivalent to bad faith.[2] Moreover, mistakes apparent on the face of an estimate or award, or resulting from a clear oversight of particular items of the work or parts of the contract, or from a clearly erroneous construction of a term of the contract, are sometimes held not to bind the contractor.[3]

Sometimes it is said that the estimates or awards may be attacked merely on the ground of substantial error.[4]

The same principle has been applied where there were merely substantial deviations from the plans.[5]

[1] McFadden *v.* O'Donald, 18 Cal. 160.

[2] St. Paul, etc. R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. R. 1; Langdon *v.* Northfield, 42 Minn. 464, 44 N. W. R. 984; Crumlish *v.* R. Co., 5 Del. Ch. 270.

[3] Lewis *v.* Chicago, etc. R. Co., 49 Fed. R. 708; Peters *v.* Quebec Harbor Com'rs, 19 Can. S. C. 685.

[4] Anderson *v.* Imhoff (Neb.), 51 N. W. R. 854; McCoy *v.* Able (Ind.), 30 N. E. R. 528. In Cole Manuf. Co. *v.* Collier, 91 Tenn. 525, 19 S. W. R. 672, it was held that the reference to arbitration was not a necessary preliminary to bringing action on the contract. Where the architect was authorized to take possession of the building in case the contractor failed to perform his contract properly, it was held that the architect's decision was reviewable by the court. White *v.* Harrigan, 41 Minn. 414. See further the analogous subject of certificates, § 19, *infra*.

[5] Bond *v.* Newark, etc., 4 C. E. Gr. 376; Glacius *v.* Black, 50 N. Y. 145; Johnston *v.* De Peyster, 50 N. Y. 666; Adams *v.* New York, 4 Duer, 295; Goldsmith *v.* Hand, 26 Ohio St. 101, 107. See § 12, *ante*.

§ 17 *a*. In any case, however, if the contractor has refused to submit a claim to the arbitrating superintendent, he cannot recover.[1] So, too, where the owner takes no steps to select or join in the selection of arbitrators, the claim may be prosecuted even though no award has been made.[2]

The requirement of submission to arbitration is binding upon a contractor who sub-lets the plastering to another, adopting in the sub-contract the terms of the principal contract.[3] The finality of the architect's acceptance of course affects the owner also.[4]

§ 18. DISTINCTION BETWEEN AWARD BY ARBITRATION AND CERTIFICATES STIPULATED FOR IN THE CONTRACT. The authorities agree that the certificate of an architect, furnished according to a stipulation in a building contract, is not an award;[5] nor can the parties be regarded as having submitted to arbitration,[6] unless there is a provision that the architect is to settle all matters in dispute, and other subsequent matters, in which case the architect is an arbitrator. "When by an agreement the right of one of the parties to have or do a particular thing is made to depend upon a third person, this is not a submission to arbitration, nor is the determination thereof an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and

[1] Fulton *v.* Peters, 137 Pa. 613, 20 Atl. R. 936.

[2] Williams *v.* Shields, 7 N. Y. Suppl. 502.

[3] Brown *v.* Decker (Pa.), 21 Atl. R. 903. As to a surety, see § 69, *infra*.

[4] Vulcanite Paving Co. *v.* Philadelphia Traction Co., 115 Pa. 280, 8 Atl. R. 777; Kennedy *v.* Poor (Pa.), 25 Atl. R. 119.

[5] Wadsworth *v.* Smith, L. R. 6 Q. B. 333, 40 L. J. Q. B. 118.

[6] Ibid., and Northampton Gas Co. *v.* Parnell, 15 C. B. 630, 24 L. J. C. P. 60.

the determination, though in the form of a certificate, be an award."[1] So where questions of additions and alterations were to be determined by the architect,[2] and where work was to be performed according to a schedule of prices to be decided by the architect, the rules of arbitration were held to apply.[3]

§ 19. CERTIFICATE A CONDITION PRECEDENT. The usual provision of building contracts that the certificate of an architect shall be obtained before money is paid, either during the progress of the work or upon its completion, renders the procurement of such certificate a condition precedent to an action on the contract. The builder cannot claim the balance of the money due him unless he first obtains such certificate, or shows that it has wrongfully been refused.[4] The generally accepted rule is, that the certificate (like the estimate or award of an arbitrator) is binding where the parties have so agreed, unless the architect has been guilty of fraud or collusion.[5] So where the builder is to furnish the certificate of an architect for extra work, he must do so.[6]

There is no right to the money earned until the condition is performed; for the owner agreed to pay only what is certified to by the architect, and the court will not presume that such certificate is wrongfully with-

[1] Wadsworth *v.* Smith, L. R. 6 Q. B. 332, 40 L. J. Q. B. 118.

[2] Stevenson *v.* Watson, L. R. 4 C. P. D. 148, 48 L. J. C. P. D. 318.

[3] Mills *v.* Bayley, 2 H. & C. 36, 32 L. J. Ex. 179.

[4] Packard *v.* Van Schoick, 58 Ill. 79; Morgan *v.* Birnie, 3 M. & Scott, 76; Glenn *v.* Leith, 1 Com. L. R. 569.

[5] Boettler *v.* Tendrick, 73 Tex. 488, 11 S. W. R. 497; Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. R. 384; Hanley *v.* Walker, 79 Mich. 607, 45 N. W. R. 57 (citing many cases); Bliss *v.* Smith, 34 Beav. 508; Mercer *v.* Harris, 4 Neb. 82; School Dist. *v.* Randall, 5 Neb. 408; Williams *v.* R. Co. (Mo.), 20 S. W. R. 631.

[6] Mills *v.* Weeks, 21 Ill. 568.

held.[1] In a Pennsylvania case, where the certificate was a condition precedent to payment, the court held that the refusal of the agent to give the certificate was no defence in an action for payment if it was proved that the work was done in accordance with the contract.[2] This decision, however, does not concur with the weight of authorities, and in the absence of fraud the procuring of the certificate will be held a prerequisite to payment. So strictly has the rule herein laid down been upheld by the English courts, that the absence of allegations of fraud or collusion in the declaration has been held fatal to the action. For instance, where the averment was "that the surveyor had wrongfully and improperly neglected and refused to give his certificate," the court decided, upon demurrer, that no action could be sustained, as neither fraud nor collusion was distinctly set forth.[3]

Where there has been gross misrepresentation by the architect of matters forming an integral part of the contract, it virtually amounts to fraud, whether perpetrated upon the builder in refusing a certificate, or upon the owner in withholding material facts to his detriment. So an architect concealing a defect from the builder, knowing him to be ignorant thereof, was deemed to have perpetrated fraud.[4] So, on the other

[1] Dunaberg, etc. Ry. Co. *v.* Hopkins *et al.*, 36 L. T. 733; *contra*, Mansfield *v.* Doolin, 4 Ir. R. C. L. 17; Adams *v.* New York, 4 Duer, 295, 44 N. Y. 143, 50 N. Y. 144, 1 Hilt. 388. A literal performance of a building contract in every detail is not, however, a condition precedent to payment. Heckman *v.* Pinkney, 81 N. Y. 211. So where a building contract recited that the county commissioners should superintend the work, such superintendence was not a condition precedent. Greene *v.* State, 8 Ohio, 310.

[2] Whelan *v.* Boyd, 5 Cent. Rep. 651. See Loeffler *v.* Froelich, 35 Hun, 368.

[3] Stevenson *v.* Watson, L. R. 4 C. P. D. 148, 48 L. J. C. P. D. 318; Clarke *v.* Watson, 18 C. B. N. S. 278.

[4] Phillips *v.* Foxall, L. R. Q. B. 679, 41 L. J. Q. B. 293.

hand, where there were circumstances unrevealed by the owner of the building which tended to prejudice the architect in his decision;[1] and in all cases where a party makes representations which he knows to be false, and injury ensues,[2] fraud will be inferred.

It has been held that if the architect capriciously[3] refuses to give proper certificates when required, the builder may maintain an action against the architect for specific performance[4] or for damages.[5] It would be a manifest injustice, it is said, for a contractor to be deprived of his pay because the architect arbitrarily refuses to certify to the completion of the work. So, if the architect arbitrarily refuses to sign certificates, suit may be brought upon the contract.[6] But in England it seems that the owner must have colluded in some way in order that the architect's conduct may operate to dispense with the certificate as against the former.[7]

[1] Kemp *v.* Rose, 1 Giff. 258; Kimberly *v.* Dick, L. R. 13 Eq. 1, 41 L. J. Ch. 38; London T. Co. *v.* Bailey, 3 Q. B. D. 217.

[2] Foster *v.* Charles, 7 Bing. 105.

[3] Fowler *v.* Deakman, 84 Ill. 130; Badger *v.* Kerber, 61 Ill. 328.

[4] Brunsden *v.* Beresford, 1 Cababe & Ellis, 62; Batterbury *v.* Vyse, 2 H. & C. 42, 32 L. J. Ex. 177.

[5] Ludbrook *v.* Barrett, 46 L. J. C. P. D. 798, 36 L. T. (N. S.) 616.

[6] Fowler *v.* Deakman, 84 Ill. 130.

[7] Smith *v.* Howden Union, apparently reported only in the Appendix to Hudson on Building Contracts, 1891. Yet, in Swiney *v.* Ballymena Com'rs, 23 L. R. Ir. 122, the action was allowed on the ground merely of gross and wilful delay of the engineer and the owner, no collusion being predicated. In Chism *v.* Schipper, 51 N. J. L. 1, 16 Atl. R. 316, the architect was alleged to have withheld the certificate "wilfully and fraudulently," but no participation by the owner was alleged, and the court allowed a recovery on demurrer. In Wisconsin, "mistake" or "fraud" or caprice of the architect alone is sufficient. Bannister *v.* Patty, 35 Wis. 213; Bentley *v.* Davidson, 74 Wis. 420, 43 N. W. R. 139. In Hackenstein *v.* K. & J. Co., 25 Atl. R. 119, a question of fact was given to the jury, though covered by the certificate. In Willcox *v.* Stephenson (Fla.), 11 So. R. 659, gross mistake equivalent to fraud was held sufficient. "Unreasonably and wrongfully" was the test applied in Wright *v.* Reusens, 15 N. Y. Suppl. 590.

The architect is generally held to be jointly or severally liable,[1] but not if his omission to certify was simply from negligence or carelessness, and without notice,[2] nor is his employer responsible for such misconduct on the part of his architect.[3]

As in law, so in equity, the chancery courts will not enforce the specific performance of a contract where the action is brought simply upon the ground of the architect's refusal to give a certificate, excepting in those cases where there is gross fraud,[4] or misrepresentation or collusion.[5] And such fraud, etc., must be distinctly alleged in law,[6] and necessarily in equity, to give the court jurisdiction.[7] So, in a Wisconsin case, where the plea set forth that improper and inferior materials had been used by the plaintiff, and that the architect had wrongfully certified satisfaction, and in other respects failed to discharge his duty as an architect, thus perpetrating a fraud upon the rights of defendant, the court held that the defendant was entitled to show in evidence all facts tending to prove bad faith on the part of the architect in accepting the building.[8]

§ 20. If, however, the owner fails to comply with his part of the contract, and the building cannot be completed by reason of his non-compliance, the architect's certificate need not be obtained prior to com-

[1] Ludbrook *v.* Barrett, 46 L. J. C. P. D. 798, 36 L. T. (N. S.) 616.

[2] Stevenson *v.* Watson, L. R. 4 C. P. D. 148, 48 L. J. C. P. D. 318.

[3] Clarke *v.* Watson, 18 C. B. (N. S.) 278, 34 L. J. C. P. 148.

[4] Scott *v.* Liverpool, 3 De G. & J. 334, 28 L. J. Ch. 230; Bliss *v.* Smith, 34 Beav. 508.

[5] McIntosh *v.* Great Western Ry. Co., 2 De G. & Sm. 758, 24 L. J. (N. S.) Ch. 469.

[6] Stevenson *v.* Watson, 48 L. J. C. P. D. 318, L. R. 4 C. P. D. 148.

[7] Scott *v.* Liverpool, 3 De G. & J. 338, 28 L. J. Ch. 230.

[8] Tetz *v.* Butterfield, 54 Wis. 242.

mencing an action.[1] The certificate would not be required where the action was brought, not on the special contract, but on the implied contract (common counts) to pay for benefits received.[2]

Sometimes contracts specify that the architect shall merely give a construction of its stipulations, but, in cases of dispute as to his decision, the whole matter shall be submitted to arbitration, in which cases the architect's decision is not final, for neither party can prevent the arbitration to the detriment of the other.[3]

§ 20 *a*. WAIVER. Mere payment of sums on account before completion of the work is not a waiver of the condition that an architect's certificate of satisfactory completion shall be given,[4] nor mere taking possession, after the work is completed, of a house which the plaintiff had contracted to plaster.[5]

§ 20 *b*. ARCHITECT'S RESPONSIBILITY. An architect occupying the position of an arbitrator, in ascertaining the amount due under a building contract, is not liable to an action for refusing to reconsider his certificate, or give the grounds of his opinion, no fraud or collusion being alleged;[6] nor is any person called upon to act as arbitrator liable to an action for want of care or skill, or for negligence.[7]

[1] Hall *v.* Bennett, N. Y. Superior Court, J. & S. 302.

[2] Davis *v.* Badders (Ala.), 10 So. R. 422. It was not required where the owner, by his own act, so injured the building as to destroy the effect of the plaintiff's work thereon; Dayn *v.* Ebbesen, 72 Wis. 284, 39 N. W. R. 535; nor where a contractor, for no fault of his own, was required to abandon the work. Byron *v.* New York, 54 N. Y. Super. Ct. 411. See, also, p. 21, note 1, *infra*.

[3] Parmalee *v.* Hambleton, 24 Ill. 605, Smith *v.* Alker, 2 Cent. Rep. 904.

[4] Brown *v.* Winehill, 3 Wash. St. 524, 28 Pac. R. 1037; McNamara *v.* Harrison, 81 Ia. 486, 46 N. W. R. 976; *contra*, Bannister *v.* Patty, 85 Wis. 213.

[5] Hanley *v.* Walker, 79 Mich. 607, 45 N. W. R. 57; *contra*, Blethen *v.* Blake, 44 Cal. 117.

[6] Stevenson *v.* Watson, 4 C. P. D. 148.

[7] Pappa *v.* Rose, L. R. 7 C. P. 525.

Under an agreement that the work shall be valued by "competent persons," the owner may name the architect as arbitrator.[1]

§ 21. Form of Certificates. No particular form of certificate is required. The following short statement will usually suffice: —

> I hereby certify that the work of J. B. has been completed to my entire satisfaction, in conformity to the specifications and drawings, and in a substantial and efficient manner. I further certify that there is a balance of $ ——— due to him under the contract.
>
> A. L., *Architect.*

So will any words conveying the same meaning. In fact, if there is no stipulation in the contract to the contrary, the certificate need not be in writing at all, — a parol approval will satisfy the condition.[2] But it is always advisable to provide in the agreement that the architect's certificate shall be in writing.[3]

Where the certificate of two architects who are partners is provided for, and the certificate is signed by one of them in the firm name, this will be sufficient.[4]

The provision in a contract for a certificate of completion, to be given by the architect, will not be satisfied by simply checking off the builder's charges.[5] But it will not be necessary for the certificate to mention the amount remaining due.[6] It was held sufficient, where an architect certified that the work was acceptable with the exception of some slight additions

[1] Stoke *v.* McCullough, 1 Cent. Rep. 55, Dec. 328.
[2] Kirk *v.* Bromley Union, 2 Phill. 640.
[3] Pashby *v.* Mayor, etc., 18 C. B. 2; Jones *v.* Jones, 17 L. J. Q. B. 170.
[4] Lull *v.* Korf, 84 Ill. 220, Dec. 45.
[5] Morgan *v.* Birnie, 3 M. & Scott, 76, 9 Bing. 672.
[6] Pashby *v.* Mayor, etc., 18 C. B. 2.

necessary and not executed, and it appeared that these had afterwards been made.[1]

§ 22. SATISFACTION OF THE OWNER. — It frequently happens that the contract contains a stipulation that the work shall be subject to the approval of the owner of the building. The provision can be so framed as to make such an approval quite arbitrary, yet the law will not permit it to be exercised to the injury of the other party; it must be used in good faith, and not for the especial purpose of defeating the contract.[2] So when work has been done not strictly in accordance with the contract, yet is received and is of benefit to the party receiving it, he shall pay its fair value.[3] But if the contract specifies that the materials shall be approved before being used, the party furnishing them should apply to have them approved, or he uses them at his peril.[4]

[1] Mills *v.* Weeks, 21 Ill. 568. A mere order by the architect, requesting the owner to pay the contractor a certain sum on account, was held not a sufficient certificate; Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. R. 384; and a certificate showing merely the amount due was held, upon the terms of the contract, to be insufficient; Ray *v.* Boteler, 40 Mo. App. 213. Where the contractor had received a certificate from the architect, but had returned it to him, the amount given not being satisfactory, the contractor was not allowed to recover, the certificate being wanting; Bournique *v.* Arnold, 33 Ill. App. 303; so, also, where the payment was due ten days after the estimate of the engineer was made, and it did not appear that the contractor had made any demand on the engineer for a certificate. Byron *v.* Low, 109 N. Y. 291, 16 N. E. R. 45.

[2] Stadhard *v.* Lee, 3 B. & S. 364, 32 L. J. Q. B. 75; Andrews *v.* Belfield, 2 C. B. (N. S.) 779. See Hawkins *v.* Graham, 149 Mass. 284, 21 N. E. R. 312, where the performance of a contract to put in heating apparatus, that was to fulfil certain tests and to be "satisfactory," was held to be determinable according to the standard of a reasonable man's judgment, and not the mere private taste or liking of the owner. Logan *v.* Berkshire Apartment Ass'n, 18 N. Y. Suppl. 164, where performance "to the satisfaction of" the owners was construed to mean performance such as should have satisfied them.

[3] Ford *v.* Smith, 25 Ga. 675.

[4] Higgins *v.* Lee, 16 Ill. 495, Dec. 41.

Where an agreement stipulated that the building was to be erected according to plans and specifications, to the full satisfaction of the architect *and of the owner*, it was held that, in the absence of proof of fraud, mistake, or unfair dealing on the part of the architect, his acceptance or satisfaction bound the owner.[1]

The right of approval is not to be construed as an arbitrary one,[2] and the court will direct the jury to give the language a liberal and reasonable construction.[3] The mere acceptance of a house erected upon his own land will not preclude the proprietor thereof from showing that the work was performed in an unworkmanlike manner. If the approval of the work by the owner is a condition precedent to payment, there must be ample opportunity afforded him to inspect the same before he is required to pay. This subject will be further considered when we come to speak of the performance of building contracts,[4] and acceptance of defective work.[5]

§ 23. The Superintendent, Foreman, or Boss of Construction, in this country, corresponds with the official known in England as the clerk of the works. He is *de facto* acting architect, and a most important functionary. His duties are generally to oversee the work and report defects, etc., on large buildings. The superintendence of government buildings, both national and

[1] Tetz *v.* Butterfield, 54 Wis. 242. Where the work was to be done "to the satisfaction of the architect or his assistant or superintendent," it was held that it was enough to satisfy either of those persons. Vermont St. Church *v.* Brose, 104 Ill. 206; Wildey *v.* School District, 25 Mich. 419.

[2] Dallam *v.* King, 4 Bing. N. C. 105.

[3] Parson *v.* Sexton, 4 C. B. 899; Moffatt *v.* Dickson, 13 C. B. 543, 22 L. J. C. P. 265.

[4] Stadhard *v.* Lee, 3 B. & S. 364, 32 L. J. Q. B. 75; Andrews *v.* Belfield, 2 C. B. (N. S.) 779.

[5] *Post*, Ch. IV.

municipal, is often awarded in this country to practical builders, whose part of the work is to follow the working plans of the architect in chief, the latter having no further connection with the construction.

CHAPTER IV.

PERFORMANCE OF BUILDING CONTRACTS.

§ 24. General View. The rule has been authoritatively stated that parties to an entire contract are bound to execute *all* its stipulations, and that no part of the consideration can be recovered in an action on the contract until the whole is performed.[1] That is to say, if there is no act of default or interference on the part of owner of the building, an action for *indebitatus assumpsit* cannot be sustained.[2] Yet sometimes the circumstances of the case may be such that a new contract will be implied from the conduct of the parties, as where the terms of the special contract have been altered by mutual consent, or by acceptance of the work which is really beneficial,[3] or extra services have been performed, and suit may be brought on a *quantum meruit* for the work actually performed.[4] The general rule governing the performance of contracts, which requires that written agreements be followed according to the intention of the parties and the true spirit and meaning of the stipulations, applies to building contracts.[5] It sometimes happens that a strictly literal

[1] Parsons on Contracts, § 522; Roberts *v.* Havelock, 3 B. & Ad. 404.

[2] Dermott *v.* Jones, 2 Wall. 1; Cutter *v.* Powell, 2 Smith's Lead. Cas. 41, 6 T. R. 320.

[3] Crookshank *et al. v.* Mallory, 2 G. Gr. (Iowa) 257.

[4] Derby *v.* Johnson, 21 Vt. 17; Bank *v.* Patterson, etc., 7 Cranch, 299.

[5] Hayward *v.* Leonard, 7 Pick. 181; Jennings *v.* Camp, 13 Johns. 94; White *v.* Oliver, 36 Me. 93; Ellis *v.* Hamlen, 3 Taunt. 52; Nolan *v.* Whitney, 88 N. Y. 648.

performance of a contract would not fulfil its true purpose; so the law looks to the intention of the parties rather than an exact compliance with the language of their agreement.[1]

Building contracts frequently provide that the builder shall not receive any compensation until the completion of his undertaking.[2] And in such cases he is not entitled to recover the value of the materials used in the construction as far as finished.[3] The owner is not liable for goods sold and delivered,[4] unless the contract is apportionable, or there is an understanding that the material and labor are to be paid for as the work progresses.

§ 25. Instances of Entire Contracts. Where a ship was to be put in thorough repair, and the builder demanded part payment for partial performance, the court held that he was not entitled until he had completed the job.[5] So where a party agrees to do certain work, and to furnish materials for a stipulated price, to be paid upon completion, he cannot abandon the contract and recover for what he has done.[6] So where a builder agreed to repair a house and complete the work by a certain day, to be paid therefor a certain sum "when the job is completed," but abandoned the

[1] There was proper performance of a contract for heating well and sufficiently, where the equipments furnished were sufficient for the building as described in the plans shown the contractor. Phœnix Iron Co. *v.* The Richmond, 6 Mackey, 180; and of a contract for furnishing heating apparatus, where the apparatus conformed to the contract, but would not work in consequence of defects in the boiler, which had been furnished by the owner. Knutzen *v.* Hanson, 28 Neb. 591, 44 N. W. R. 1065.

[2] Ellis *v.* Hamlen, 3 Taunt. 52; Stewart *v.* Craig, 3 G. Gr. (Iowa) 502; Rees *v.* Lines, 8 Car. & P. 126.

[3] Clark *v.* Bulmer, 11 M. & W. 243.

[4] Cotterell *v.* Apsey, 6 Taunt. 322.

[5] Roberts *v.* Havelock, 3 B. & Ad. 404.

[6] Morton *v.* Read, 2 S. & M. 585; Chambers *v.* King, 8 Mo. 517.

work before completion, it was held that, as the contract was entire, full performance being a condition precedent to the payment, the builder could not recover *pro rata* compensation for the work done;[1] but if the job had been completed by the defendant, the plaintiff could have recovered the contract price less the defendant's damages.[2] So, also, where the contract is to do specific work for a specific sum, the courts hold that the contract must be fully executed before payment can be demanded.[3] These decisions seem based upon the theory that one who has failed to perform fully his part of an agreement cannot recover on the special contract, because he has not complied with it, nor on the common count, because there is a special contract.[4]

The general rule seems to be that, where a building contract is entire, the work cannot be considered done, nor the materials furnished, nor the money payable, until the contract is wholly executed.[5] Thus a contract to bore a well-hole, at a certain rate per hundred feet, requires the contractor to bore as long as practicable, and if he abandons the work before completion, or the time specified, he is entitled to no compensation whatsoever.[6]

So where a person enters into an agreement to expend a certain amount of money upon the land of another, and after spending a portion of it fails to complete his contract, he has no lien on the land for

[1] Kettle *v.* Harvey, 21 Vt. 301, 24 Vt. 515, 33 Vt. 39.

[2] Austin *v.* Austin, 47 Vt. 311.

[3] Sinclair *v.* Bowles, 9 B. & C. 92. See, however, Lord Tenterden's opinion in case just cited; also Wade *v.* Haycock, 25 Pa. 382; Sickle *v.* Pattison, 14 Wend. 257.

[4] Morton *v.* Read, 2 S. & M. 585.

[5] Edwards *v.* Derrickson, 4 Dutch. 39; Derrickson *v.* Edwards, 5 Dutch. 468.

[6] Stewart *v.* Weaver, 12 Ala. 538.

the sum expended.[1] The usual cases where the entirety of a contract is upheld are those in which time of performance is made essential, such as agreements to complete buildings by a certain date specified in the contract.[2] Of these we shall speak later on.[3] The question of recovery after part performance depends upon whether the consent of the defendant to an abandonment has been expressed or can be implied from an acceptance of the work,[4] and whether completion has been prevented by the defendant[5] or by the act of God.[6]

§ 26. SUBSTANTIAL PERFORMANCE.[7] In a leading case,[8]

[1] Wallis *v.* Smith, L. R. 21 Ch. D. 243, 52 L. J. Ch. 145, 47 L. T. 389, 31 W. R. 214.

[2] Cutter *v.* Powell, 6 T. R. 320, S. C. 2 Smith's Lead. Cases, Hare & Wallace's Notes, 41; Dickey *v.* Linscott, 20 Me. 453; Fenton *v.* Clark, 11 Vt. 557.

[3] See Ch. v.

[4] Cutter *v.* Powell, *supra.*

[5] Derby *v.* Johnson, 21 Vt. 17; Moulton *v.* Trask, 9 Met. 577; Bannister *v.* Reed, 1 Gilman, 92.

[6] Hair *v.* Bell, 6 Vt. 35; Philbrook *v.* Belknap, 6 Vt. 583; Olmstead *v.* Beale, 19 Pick. 528.

[7] *Substantial Performance.* In the following cases it was held that there was substantial performance: Marquis *v.* Loretson, 76 Ia. 23, 40 N. W. R. 73 (where the contract was for plans for a building to cost $10,000, and the plans as offered called for a cost of $16,000, but could be made to apply to a building costing $10,000); Hubert *v.* Aitken, 5 N. Y. Suppl. 839 (where the architect had exercised reasonable care in the supervision of a building, and the only deficiencies were some careless plumbing and the use in some places of inferior material); Smith *v.* Dickey, 74 Tex. 61, 11 S. W. R. 1049 (where the contract called for plans for a building to cost "about $100,000," and the plans as offered were on the basis of a cost of $102,000, exclusive of 5 per cent. of superintendence fees); Oberlies *v.* Bulinger, 132 N. Y. 598, 30 N. E. R. 999, reversing same case in 58 Hun, 601, 11 N. Y. Suppl. 264 (where the roof of the rear of the house

[8] Hayward *v.* Leonard, 7 Pick. 181; see Britton *v.* Turner, 6 N. H. 481. But in Hill *v.* Milburn, 17 Me. 316, it was held that a substantial compliance is not sufficient where a party contracts to build a house in a substantial manner, and that the contract must be strictly complied with.

the contract was to erect a house on the defendant's land by a certain day, for a fixed price; the work to be performed in a workmanlike manner, etc. The plaintiff substantially complied, but the work and materials varied from the contract. The defendant had been present, and had an opportunity of superintending the building. He expressed himself as satisfied with part of the work, but objected at divers times and ordered variations. After the house was ready to be turned over to him he refused to accept it, but the court held that a *quantum meruit* could be brought for the builder's work, and a *quantum valebat* for the materials. Chief Justice Parker stated that he thought that one of two things must be proved in order to uphold the plaintiff's right of recovery: either that there was an honest intention to go by the contract, and a substantial execution of it with only some comparatively slight deviations; or that there was an assent or acceptance, expressed or implied, by the party with whom the plaintiff contracted.[1] So, although a

was built five inches too low, and the appearance was in no way injured). In the following cases it was held that there was not substantial performance: Weeks *v.* O'Brien, 12 N. Y. Suppl. 720 (where the requirement that the cellar should be water-tight was not fulfilled, and the locality made it subject to the flow of water); Van Cleef *v.* Van Vechten, 130 N. Y. 571, 29 N. E. R. 1017 (where the payment was due on the completion of the plastering, and the contractor stopped work before the hall, parlor, and stairs had received the last coat of plaster). It was left to the jury to decide whether the performance was substantial in Rush *v.* Wagner, 12 N. Y. Suppl. 2 (where the violation of a requirement to lay a floor "free from knots" was in question). In Lake *v.* McElfatrick, 19 N. Y. Suppl. 494, it was held that the failure of an architect to see that a stone skew-back was not put into a theatre-wall as required was not a breach going to the essence of the contract, though the wall subsequently fell, unless it was shown that the lack of the skew-back contributed to the fall.

[1] See Smith *v.* First Cong. Ch., 8 Pick. 178; Jennings *v.* Camp, 13 Johns. 94; Snow *v.* Ware, 13 Met. 42; Olmstead *v.* Beale, 19 Pick. 528; Taft *v.* Montague, 14 Mass. 282; Thornton *v.* Place, 1 Moody & R. 218.

substantial performance of a building contract must be shown when payment is demanded,[1] unimportant omissions, or defects which are technical and inadvertent, will not bar recovery.[2] The law does not ordinarily require an exact and literal performance, and the builder may recover notwithstanding trivial defects.[3] To make a literal performance of a building contract in every detail a condition precedent to payment would uphold injustice to builders substantially complying with their agreements.[4] So, under a contract to rebuild a mill which had been burned down, "to be as good as the first one," a substantial performance was held sufficient.[5]

But although a substantial performance may entitle a plaintiff to recover, he is not necessarily entitled to the whole contract price; the defendant may recoup for defects in the execution of the work.[6] The cost of completing the deficiencies will always be deducted from the contract price.[7]

The only general rule which can be laid down is that if a building is erected, but not exactly according to

But see Helm *v.* Wilson, 4 Mo. 41; White *v.* Oliver, 36 Me. 93; Ellis *v.* Hamlen, 3 Taunt. 52; O'Dea *v.* Winona, 41 Minn. 424.

[1] Mehurim *v.* Stone, 37 Ohio, 49.

[2] Glacius *v.* Black, 50 N. Y. 145; Johnson *v.* De Peyster, 50 N. Y. 666, 4 Barb. 614, 35 Barb. 602.

[3] Smith *v.* Brady, 17 N. Y. 173; Nolan *v.* Whitney, 88 N. Y. 648, and cases above cited.

[4] N. Y. Court of Appeals, 1880; Heckman *v.* Pinkney, 81 N. Y. 211; Goldsmith *v.* Hand, 26 Ohio, 101.

[5] Ellis *v.* Lane, 85 Pa. 265.

[6] Monocacy Bridge Co. *v.* American Iron Bridge Co., 83 Pa. 517.

[7] Flaherty *v.* Miner, 123 N. Y. 382, 25 N. E. R. 418; Boteler *v.* Ray, 40 Mo. App. 234; Rush *v.* Wagner, 12 N. Y. Suppl. 2. But in Pinches *v.* Swedish Church, 55 Conn. 13, 10 Atl. R. 264, where the defect was in the ceiling, windows, and seats of a church, and the proper reconstruction would be costly, the defendant was allowed to deduct only the difference in the value of the building as constructed and as planned.

the contract and specification, yet the work is executed in good faith, or if an exact compliance is waived, the plaintiff may recover what the work is really worth to the defendant, not exceeding the contract price.[1] This has also been upheld in New Hampshire.[2] A more rigid rule has been applied in New York, the object of which is to secure the strict performance of contracts which expressly specify what is to be done.[3]

The rule is sometimes stated to be that, if the contractor has acted in good faith, and the deficiencies are non-essential and are such as can be remedied by allowing the owner a deduction from the contract price to cover the necessary expense, the contractor may recover the contract price less such deductions.[4] This would be the proper rule wherever the owner has the right to complete the work himself if not finished at a specified time.[5]

§ 27. Partial Performance and Recovery upon a Quantum Meruit. "When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth

[1] Hayward *v.* Leonard, 7 Pick. 187; Smith *v.* Lowell Meeting House, 8 Pick. 181; Phelps *v.* Sheldon, 13 Pick. 50; Cullen *v.* Sears, 112 Mass. 299; Powell *v.* Howard, 109 Mass. 192.

[2] Britton *v.* Turner, 6 N. H. 481.

[3] Smith *v.* Brady, 17 N. Y. 173; Smith *v.* Coe, 2 Hilt. 365. But see New York cases cited *supra*.

[4] Leeds *v.* Little, 42 Minn. 414, 44 N. W. R. 309; Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. R. 845; Valk *v.* McKeize, 16 N. Y. Suppl. 741; Crouch *v.* Gutman, 134 N. Y. 45, 31 N. E. R. 271; Aldrich *v.* Wilmarth (S. D.), 54 N. W. R. 811.

[5] Wells *v.* Board of Educ., 43 Mich. 357, 44 N. W. R. 845.

such a sum of money, which the defendant has omitted to pay."[1] So, "when there is an express contract for a stipulated amount, and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumpsit;"[2] "he must show a new contract, arising from, it may be, but entirely independent of, the original." A *quantum valebat* applies in the same way to the implied promise to pay for goods, merchandise, or materials what they are reasonably worth.[3] It would appear from its very nature that the right to sue upon a *quantum meruit* after a special contract depends entirely upon the fact of the discharge of the original contract by an action of *indebitatus assumpsit*.[4] Yet it has been authoritatively laid down that "wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything which he had done under it previously to the rescission."[5]

FIRST. *Performance prevented by the other contracting*

[1] 2 Blackstone Com. 162, 163; 1 Viner Abr. 346; 2 Phillips Ev. 82; Bouvier's Law Dictionary, "Quantum Meruit."

[2] Addison on Contracts, 214; Holt, Nisi Prius, 236; 10 Johns. 36; 14 Johns. N. Y. 326; 10 Serg. & R. (Pa.) 236; 7 Cranch, 299; 4 Carr. & P. 93.

[3] See distinction between a *q. m.* and *q. v.* in Coates *v.* Glenn, 5 Md. 121.

[4] Anson on Contracts, 269.

[5] Dermott *v.* Jones, 2 Wall. 1; Hulle *v.* Heightman, 2 East, 145; Cutter *v.* Powell, 2 Smith Lead. Cas. 44, 2 Sm. L. C. 21; Reid *v.* Hoskins, 4 E. & B. 979. The refusal must be an unqualified one. Cort *v.* Ambergate Ry. Co., 17 Q. B. 127. Yet it will be sufficient if he simply places himself in a position where it will be impossible for him to perform. Robson *v.* Drummond, 2 B. & Ad. 303; Planche *v.* Colburn, 8 Bing. 14.

party. If a builder is prevented from completing his contract by the fault of the other party to the contract, he is unquestionably entitled to recover for the work he has performed, and for all damages incurred by him in consequence of the discontinuance of the contract by the defendant.[1] Therefore a suit of *indebitatus assumpsit* can be brought where a contractor has been deprived of the benefits of his contract by the action or delay of the building owner;[2] and this, too, whether intentional or resulting from other causes, as where an action on the case is had for erecting a nuisance.[3] In such cases the builder may demand his rights under the contract, or claim damages,[4] for he is excused from completing the work.[5] So, in a contract to pay for building by instalments, it was held that upon failure to pay one of the stipulated instalments the contractor could abandon the contract, and recover the profits he might have made by completing the building.[6] Yet a builder erecting an improvement upon the land of another for *mutual occupation* may sue for breaches of the contract, but cannot seek a rescission of it and recover on a *quantum meruit*.[7] So where a contract to perform certain work provides that a suspension of the work by the employer shall give the contractor no claim for damages, etc., a suspension in good faith will not relieve the contractor from his undertaking.[8] The

[1] Derby *v.* Johnson, 21 Vt. 17; Moulton *v.* Trask, 9 Met. 577; Bannister *v.* Reed, 1 Gilman, 92; Guerdon *v.* Corbett, 87 Ill. 272.

[2] Goodman *v.* Pocock, 15 Q. B. 576; Derby *v.* Johnson, 21 Vt. 17.

[3] Derby *v.* Johnson, 21 Vt. 17.

[4] Planche *v.* Colburn, 8 Bing. 14; Lawson *v.* Wallasey, etc., 52 L. J. Q. B. 302, 48 L. T. 507.

[5] Com. Dig. "Condition," L. 6.

[6] Co. of Christian *v.* Overholt, 18 Ill. 223.

[7] Toledo, Wabash & W. R. R. *v.* Depot Building, 63 Ill. 308.

[8] Snell *v.* Brown, 71 Ill. 134.

rule as to default is succinctly stated in a Louisiana decision, that he who fails to perform his part of a contract, when the other renders performance, is liable to damages.[1]

When the performance on the part of a contractor is dependent upon something which is to be done by the employer, who did not give the contractor explicit notice to proceed with the work, the former is nevertheless liable to the contractor for damages.[2] Although a party cannot recover upon a contract he has failed to perform, he may obtain the value of such work upon a *quantum meruit*, less the damages sustained by the defendant.[3] If a contractor is released by consent, he can sue in assumpsit for work performed.[4]

It may be laid down as a general rule that in all cases where the contractor has the right to avoid or rescind a written contract, whether by virtue of default of the owner or otherwise, he may recover for work actually performed upon a *quantum meruit*.[5]

A person who contracts to do a certain piece of work, and voluntarily leaves it unfinished without good cause, cannot recover anything for his work.[6] The liability for the non-performance of a building contract will fall on the party who was the cause of the contract not being carried into effect.[7] In cases where the duty consists of parts which are severable in their nature,

[1] Hyde *v.* Grisby, 11 La. 240 ; Oxnard *v.* Locke, 13 La. 449.

[2] Louisville & N. R. R. Co. *v.* Hollerbach, 3 W. R. 364.

[3] McClay *v.* Hedge, 18 Iowa, 66; Pixler *v.* Nicols, 8 Iowa, 106. This doctrine is disputed. See *post.*

[4] B. & O. R. R. *v.* Resley, 7 Md. 297.

[5] Simmons *v.* Lawrence, etc., 133 Mass. 298 ; Ford *v.* Burchard, 130 Mass. 424.

[6] Faxon *v.* Mansfield, 2 Mass. 147, 7 Pick. 185, 19 Pick. 529.

[7] Cutter *v.* Powell, 2 Smith's Lead. Cases, Hare & Wallace's Notes, 44, 2 Sm. L. C. 11 ; Franklin *v.* Miller, 4 A. & E. 599.

a partial performance will sustain an action *pro tanto*, or constitute a good defence *pro tanto*. For instance: if by the contract a portion of the pay is to be made upon the completion of a portion of the work, the performance of that part of the work is *pro tanto* a condition precedent, not the performance of the whole contract.[1] But there can be no recovery *pro tanto* on a special contract without a legal cause for abandoning the work.[2] Yet if the defendant has accepted a part performance, the plaintiff may recover *pro tanto*.[3]

Where the non-performance of a building contract is due to prevention by the unauthorized act of the owner, the contractor may recover the value of the work done, irrespective of the contract price.[4] A

[1] Morgan *v.* Ward, Wright, 474.

[2] Allen *v.* Curles, 6 Ohio St. 505.

[3] Robinson *v.* Snyder, 25 Pa. 203.

[4] Kelly *v.* Rowane, 33 Mo. App. 440. In Lynch *v.* Sellers, 41 La. Ann. 375, 6 So. R. 561, the owner caused the destruction of a building which the plaintiff had contracted to remove, and the plaintiff was allowed to abandon the contract and recover the profits he would have made. In Ellithorpe Air Brake Co. *v.* Sire, 41 Fed. R. 662, the plaintiff recovered the value of labor and materials where the completion of his contract for furnishing the machinery for an elevator had been wrongfully prevented by the owner. In Byron *v.* New York, 54 N. Y. Super. Ct. 411, the contractor followed the specifications, which were so defective that the tunnel fell, and the contractor was allowed the value of labor and materials. In Rayburn *v.* Comstock, 80 Mich. 448, 45 N. W. R. 378, where the plaintiff recovered, the defendant had first notified the plaintiff to cease work, and then gave notice to proceed, but not till after plaintiff had engaged himself under another contract. In Beswick *v.* Platt (Pa.), 21 Atl. R. 306, the contractor was held not responsible where a wharf gave way because of defects in the plan furnished him by the owners. Cf. Feike *v.* Col. & E. R. Co., 5 Ohio Cir. Ct. 199, where the contractor promised to conduct bridge repairs "so as not to interfere with the running of trains," yet was held not responsible for the fall of the bridge under a passing train during the progress of the repairs. In Heaver *v.* Lanahan, 74 Md. 49, 22 Atl. R. 263, the owner notified the contractor not to begin work, the land having been taken for a street; the contractor was given damages for breach of contract. In Wilderman *v.* Pitts, 39 Ill. App. 416, the plaintiff was prevented by the defendant from making certain necessary tests. In Theo-

builder may recover upon a *quantum meruit* where completion has been prevented by the owner, although, by the terms of the contract, payment was to be in the land.[1] Where the contractor is prevented by some act of the employer, he will not be liable for penalties for non-performance,[2] although he has an action for damages against the owner.[3]

If suit is brought upon a written contract, the plaintiff cannot show that he has sustained damages in consequence of the delays of the defendant in furnishing materials. For in setting up the special contract he makes it the *gravamen* of his action, and thereby precludes himself from recovery for delays, etc.[4]

The measure of damages[5] in consequence of the act of the landowner, or other party owning the building,

bald *v.* Burleigh (N. H.), 23 Atl. R. 367, the plaintiff recovered for services in moving a building, though the inability of the owner to get a permit for removal to a certain lot prevented the completion of the job. In Highton *v.* Dessau, 19 N. Y. Suppl. 395, the plaintiff was delayed in his mason-work by the delay of an independent contractor, and the owner subsequently ordered the plaintiff to quit work; he was allowed to recover. In Scheible *v.* Klein, 89 Mich. 376, 50 N. W. R. 857, the question, whether the failure of the owner to make certain agreed payments on account was material, was submitted to the jury. In Joyce *v.* White (Cal.), 30 Pac. R. 524, the defendant prevented the completion of the work. In Geary *v.* Bangs, 37 Ill. App. 301, and 27 N. E. R. 462 (*contra* to Co. of Christian *v.* Overholt, 18 Ill. 223), the contractor was allowed to abandon the contract on default in payment of a single instalment, and sue for the work already performed. In Davis *v.* Bronson (N. D.), 50 N. W. R. 836, one of several owners refused to allow the contractor to begin work, and the contractor was held entitled to recover. In McMaster *v.* State, 108 N. Y. 542, 15 N. E. R. 417, the defendants notified the contractor to stop work, and he was allowed to sue without further tender of performance.

[1] Bassett *v.* Sanburn, 9 Cush. 58.

[2] Holme *v.* Guppy, 3 M. & W. 387, 1 Jur. 825.

[3] Roberts *v.* Bury, etc., L. R. 5 C. P. 310, 39 L. J. C. P. 129.

[4] In Stewart *v.* Craig, 3 G. Gr. (Iowa) 502, it was held that the plaintiff could recover on *indebitatus assumpsit* for work and labor under a special contract. Bush *v.* Chapman, 2 G. Gr. (Iowa) 549.

[5] See further, on this point, § 68.

preventing a completion of the contract, is not the original contract price,[1] but the reasonable loss to the defendant, consisting of the value of the work performed and the damage sustained by him.[2] In an Illinois[3] case it was held that he might recover the profits he might have made by completing the contract. But such a rule has not always been adhered to. Thus we find in Indiana:[4] "the contract price, less any damages incurred by the defendant, is the measure of damages where performance has been unreasonably delayed;" Iowa:[5] the plaintiff can recover for the work done in proportion to the stipulated price for the whole job; Maine:[6] the contract price is made the basis of the amount which can be recovered; Massachusetts: the value of the services, and not the amount of the benefit which the person requesting them receives;[7] Michigan: "a party cannot recover more than the contract price on *quantum meruit*, and cannot recover that if his work is not reasonably worth it;"[8] Texas: the correct mode of determining the value of satisfactory work on an unfinished contract is the contract price less what it will take to complete it.[9]

On the other hand, if the fault is with the builder, the law seems definitely settled that the owner is entitled to damages to the extent of the loss sustained.[10]

[1] Cutter *v.* Powell, 2 Smith's Lead. Cases, Hare & Wallace's Notes, 44; Lawson *v.* Wallasey, etc., 52 L. J. Q. B. 302, 48 L. T. 507.

[2] Hale *v.* Johnson, 6 Kan. 137.

[3] Co. of Christian *v.* Overholt, 18 Ill. 223.

[4] Louisville & N. R. R. Co. *v.* Hollerbach, 3 W. R. 364.

[5] McCausland *v.* Cresap, 3 G. Gr. (Iowa) 161.

[6] Hayden *v.* Madison, 7 Me. 76.

[7] Stowe *v.* Buttrick, 125 Mass. 449.

[8] Allen *v.* McKibben, 5 Mich. 549; Tilden *v.* Besley, 42 Mich. 100.

[9] Gonzales *v.* McHugh, 21 Tex. 259, Dallam (Tex.), 430.

[10] *In re* Cook *v.* Gleason, 3 Chic. Leg. N. 410; Bank of Penn. *v.* Gries, 35 Pa. 423.

It has even been held that when a contractor neglects or refuses to complete an entire building contract upon the land of another, and it would be impracticable for the landowner to abandon it, he may properly retain possession of the work, so far as it has progressed, without being subject to an action upon a *quantum meruit*, unless he should render himself liable by other acts implying an acceptance.[1] It has been held to the contrary in Iowa, that where a contractor abandons his contract without the fault of the employer, he can recover what the work is reasonably worth.[2] Where workmen are employed by a contractor, and the latter abandons his contract, they may continue the work for the owner, and if they do so at his request he is liable.[3] In Louisiana it was held that, where a builder fails to complete his contract, the owner of the building may proceed to complete the work; and if the sum of money used for this purpose, and damages incurred by the owner, do not equal the contract price, the original contractor is entitled to the residue for his work.[4] Upon the bankruptcy of the contractor it was held that the damages were the amount required to finish the contract, subtracted from the contract price.[5] The general rule seems to be, that where the builder refuses or fails to complete the contract, there being no fault on part of the owner, the latter is entitled to ignore the contract, and maintain a suit to the actual or reasonable extent of his damages.[6]

[1] Elkridge *v.* Rowe, 4 Gilm. (Ill.) 91. See Effect of Acceptance, *post.*

[2] McClay *v.* Hedge, 18 Iowa, 66; Pixler *v.* Nichols, 8 Iowa, 106.

[3] Andree *v.* Bodman, 13 Md. 241.

[4] Allen *v.* Wills, 4 La. Ann. (1849) 97.

[5] Cook *v.* Gleason, 3 Chic. Leg. N. 410.

[6] Lawson *v.* Wallasey, 52 L. J. Q. B. 302, 48 L. T. 507; Elkridge *v.* Rowe, 4 Gilm. 91. The default of the contractor may excuse non-performance on the part of the opposite party. Parker *v.* Scott, 82 Ia. 266, 47

SECOND. *Performance prevented by destruction of the premises.* It is well settled that where a builder fails to complete his contract by reason of a destruction of the premises, whether from his own fault or from an unavoidable accident, the loss falls upon him, and not upon the owner.[1] So where, under a contract for building a house, the work was destroyed by fire, the builder cannot recover.[2] Where the lumber of a new building was destroyed by fire after being worked upon by a carpenter who had a contract, it was held that he could not recover, although it had been agreed that the work was to be paid for as it progressed, and although the owner received the insurance on the lumber; the carpenter had an insurable interest only.[3] So, again, "one cannot recover for work done and materials furnished under a non-apportionable contract to put up an addition to an existing building for a fixed sum, where the main house and the partially constructed addition is burned."[4] So, also, where an uncompleted building falls, by reason of a latent defect in the soil, the loss is upon the contractor.[5] It has been held,

N. W. R. 1073 (where a contractor's claim was rejected, the spire on which the work was done having fallen through his negligence); Flynn *v.* Dougherty (Cal.), 26 Pac. R. 831 (where the contractor failed to furnish the bond immediately, as agreed).

[1] Bacon *v.* Cobb, 45 Ill. 47; Thompkins *v.* Dudley, 25 N. Y. 272.

[2] Partridge *v.* Forsyth, 29 Ala. 200. But where a contractor agreed to manufacture the iron-work for a house being built, and put up the same, the work to be at his own risk until the building was completed, it was held that the manufacturer did not assume the risk of the building, which was destroyed, but only his materials furnished, and therefore that the destruction of the building by fire did not deprive him of his right to recover the price of the iron-work manufactured and ready to be delivered. Ranson *v.* Clark, 70 Ill. 657; Clark *v.* Busse, 82 Ill. 515.

[3] Eichelberger *v.* Miller, 20 Md. 332.

[4] Tilden *v.* Besley, 42 Mich. 100.

[5] Trustees, etc. *v.* Bennett, 27 N. J. L. 513. *Accord:* Stees *v.* Leonard, 20 Minn. 494; R. Co. *v.* Smith, 21 Wall. 255; Dermott *v.* Jones, 2 Wall. 1.

however, that where the contract was to do the masonry work and furnish part of the materials for a certain sum, not to be paid until completion, and the unfinished building was destroyed by fire, the contractor might recover, "especially where he treated the house as his own by procuring an insurance, and receiving money thereon after the loss."[1] This decision does not agree with the weight of authorities. The rule fixing upon the contractor a liability for buildings destroyed before completion has been carried even further, in holding that an action may also be maintained against him for the money advanced to him by the owner during the progress of the building.[2] The rule does not apply to cases where the contractor is entitled by the agreement to pay as the work progresses;[3] as, where the risk was taken by the owner, and the contractor, a carpenter, had performed part of his work, when the building was consumed, the court held that he was entitled to a mechanic's lien claim upon the ground for the amount due him at the time of the fire.[4]

THIRD. *Performance becoming impossible.* Building contracts, from their very nature, can rarely become absolutely impossible, and the instances just cited, concerning property destroyed by inevitable accident, show that the contractor will rarely indeed be excused

[1] Cook *v.* McCabe, 53 Wis. 250. Compare with Eichelberger *v.* Miller, 20 Md. 332; Garretty *v.* Brazell, 34 Iowa, 100.

[2] Thompkins *v.* Dudley, 25 N. Y. 272; School Trustees of Trenton *v.* Bennett, 3 Dutch. 613 (defective soil); Dermott *v.* Jones, 2 Wall. 1. Where the contractor has through act of God failed to perform, and the contract is entire, the owner may recover from the contractor any sums advanced before the breach by the latter; the contractor may set off his claim for work and labor. Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. R. 667.

[3] Schwartz *v.* Saunders, 46 Ill. 18; Garretty *v.* Brazell, 34 Iowa, 100.

[4] Sontag *v.* Brennan, 75 Ill. 279.

from completing his undertaking.[1] The general rule applicable to contracts, that impossibility of performance of the contract will operate as a discharge, does not frequently excuse a substantial execution of a building contract.[2] The policy of the law is to enforce the agreement strictly if possible, and it considers that, at the time of making a contract, the parties should have provided for all contingencies tending to excuse performance.[3]

Yet, if the impossibility arises from the non-existence of the subject-matter, the contract may be avoided.[4] So where a tenant who had agreed to dig not less than one thousand tons of potter clay annually, paying a certain royalty per ton, pleaded that there had never been one thousand tons on the land, the court held that the covenant is only applicable if the clay is really there.[5]

Where the contracting parties knew from the beginning that the contract could not be executed unless the existence of certain conditions remained in force, the fulfilment of the contract will be discharged by the perishing of the condition or thing.[6] For example: where a party contracts to erect a bridge, and binds himself to keep it in repair for a term of years, he is

[1] Bacon *v.* Cobb, 45 Ill. 47. See, also, Hair *v.* Bell, 6 Vt. 35; Philbrook *v.* Belknap, 6 Vt. 383; Brown *v.* Kimball, 12 Vt. 617; Stark *v.* Parker, 2 Pick. 267; Olmstead *v.* Beale, 19 Pick. 528.

[2] Paradine *v.* Jane, Aleyn, 26; Atkinson *v.* Richie, 10 East, 530; Thompkins *v.* Dudley, 25 N. Y. 272. A strike is no excuse for non-performance. Budget *v.* Binnington, 25 Q. B. D. 320. See p. 71, note 4, *infra*.

[3] Bacon *v.* Cobb, 45 Ill. 47.

[4] Strickland *v.* Turner, 7 Exch. 217. Where the building on which the work was being done was destroyed shortly before completion, the contractor was not bound to go on with the work. Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. R. 667.

[5] Clifford *v.* Watts, L. R. 5 C. P. 586.

[6] Taylor *v.* Caldwell, 3 B. & S. 833, 32 L. J. Q. B. 166.

not liable to rebuild if the bridge is destroyed by fire.[1] In *Brecknock Co.* v. *Pritchard*,[2] a contrary result was reached, that, although the bridge is washed away by an unusual and extraordinary flood through no fault of the builder, the latter is bound to rebuild under a covenant to keep it in order. In another case[3] it was held that the lessee is bound to rebuild if his lease stipulates that he shall keep the property in repair. On the other hand, where the plaintiff contracted with the defendant to erect certain machinery upon the premises of the latter for his own occupation and use, for a fixed sum, and to keep the property in order, it was held that both parties were excused from further performance when the property was accidentally destroyed by fire, and that the plaintiff was not entitled to recover anything for his machinery.[4]

The Act of God is not a defence unless it amounts to making performance absolutely impossible. The fact that the duties involved under the contract have thereby become more onerous than was anticipated when the contract was made, or that to carry out the contract after the act will impose great hardship upon the contractor, will not excuse him from performance of his stipulations. So, if the contract can be substantially carried into effect, although the act of God renders an exact performance impossible, the contract must nevertheless be complied with, if desired by the other party, as far as possible.[5] The leading rule may

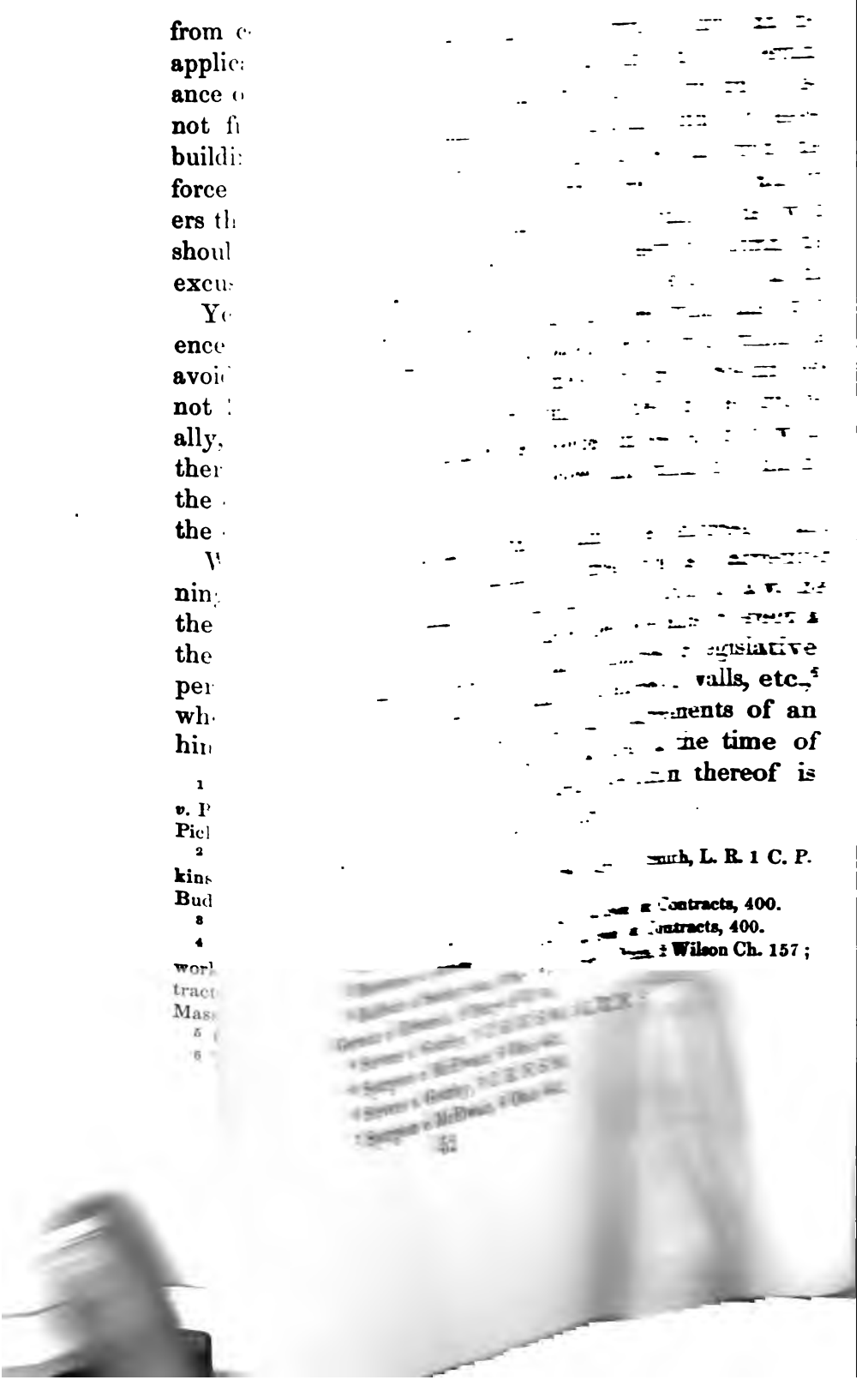
[1] Livingston Co. *v.* Graves, 32 Mo. 479, Dec. 219. In Weis *v.* Devlin, 67 Tex. 507, 3 S. W. R. 726, the contractor recovered for work done in repairing, though the house was burned before the repairs were completed.

[2] Brecknock Co. *v.* Pritchard, 6 T. R. 750.

[3] Bullock *v.* Dommett, 6 T. R. 65.

[4] Appleby *v.* Meyers, L. R. 2 C. P. 651, 36 L. J. C. P. 331.

[5] White *v.* Mann, 26 Me. 361; Chapman *v.* Dalton, Plowden, 284; Hol-



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§ 29. CONSEQUENCES OF DEFECTIVE WORK. The party ordering the erection of a building is not bound to accept a structure defectively and negligently built in violation of the contract. If he accepts the work he is not estopped from showing that it is defective,[1] yet is rendered liable by the acceptance to pay for it what it is reasonably worth.[2] On the other hand, he may order the builder to rebuild, and, if the latter refuse to comply with his agreement in a substantial manner, he may be required to remove his materials, in which event the owner will not be liable for the work already performed. If the materials are useless for the purpose, the owner is not bound to pay for them, although left upon his land.[3] The law implies that all work is to be done in a workmanlike manner, although the contract is silent upon the point. Even the fact that the price agreed upon was grossly inadequate,[4] or that the defendant saw the work done and had benefited thereby,[5] will not modify this rule.

The old English doctrine, that the party for whom work was performed upon a special contract must pay the stipulated price, and then resort to a cross suit to recover an allowance for defects,[6] has been changed long since,[7] and it is now held that the defendant may show in evidence at the trial of the action on the contract that the work was improperly done, or wholly useless for the purpose intended, and by so doing re-

[1] Korf *v.* Lull, 70 Ill. 420.

[2] Ford *v.* Smith, 25 Ga. 675; Estep *v.* Fenton, 66 Ill. 467, 56 Ill. 108, 62 Ill. 161.

[3] Hill *v.* Featherstonhaugh, 5 M. & P. 541, 548, 7 Bing. 569; Times Fire Assurance Co. *v.* Hawke, 28 L. J. Ex. 317.

[4] Smith & Nelson *v.* Bristol, 33 Iowa, 24.

[5] Smith & Nelson *v.* Bristol, 33 Iowa, 24.

[6] 2 Sm. L. C. 26; Broom *v.* Davis, 7 East, 480, note.

[7] Basten *v.* Butler, 7 East, 481.

duce the damages of the plaintiff.[1] It appears, however, from both the English and American authorities, that the plaintiff can either bring a cross action against the defendant for not properly complying with the contract, or can use the defective performance in reducing the defendant's claim.[2] Where the contract price has been paid, and the owner sues the builder for defective work, the admissions of the former, if an action had been brought for the stipulated price by the defendant, do not operate in estoppel, being confined to the original proceedings. And the same rule applies to the pleadings in the original action.[3]

When work is defectively done, but still of substantial value for the purpose intended, the plaintiff is entitled to compensation;[4] but if it is of no value to the other party, nothing can be recovered.[5] A contractor is not responsible for defective work done by a former contractor who had abandoned the job.[6] "Where a

[1] In Farnsworth *v.* Garrard, 1 Camp. 38, Lord Ellenborough held that, "if there has been no beneficial service, there shall be no pay; but if some benefit be derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand. The claim shall be coextensive with the benefit."

[2] Davis *v.* Hedges, L. R. 6 Q. B. 687; Mondel *v.* Steel, 8 M. & W. 858, 870; King *v.* Boston, 7 East, 481, note.

[3] Carter *v.* James, 13 M. & W. 713; Howlett *v.* Tarte, 10 C. B. N. S. 826.

[4] Crookshank *v.* Mallory, 2 G. Gr. (Iowa) 257; Davis *v.* Fish, 1 G. Gr. 406. Where there has been only a partial performance, but the owner has received some benefit from what has been done, the contractor may recover the reasonable value. Gove *v.* Island, etc. Co., 19 Or. 363, 24 Pac. R. 521; Ætna etc. Works, *v.* Kossuth Co., 79 Ia. 40, 44 N. W. R. 215; Gallagher *v.* Sharpless, 134 Pa. 134, 19 Atl. R. 491; School Dist. No. 2 *v.* Boyer, 46 Kan. 54, 26 Pac. R. 484. Cf. Katz *v.* Bedford, 77 Cal. 319, 19 Pac. R. 523. But not where the contractor quit work in November without justification, and did not attempt to begin again until the next spring. Scheible *v.* Klein, 89 Mich. 376, 50 N. W. R. 857.

[5] Taft *v.* Montague, 14 Mass. 282.

[6] Seymour *v.* Long Dock Co. 5 C. E. Gr. (N. J.) 396; Phila. Hyd. W. *v.* Schenck, 80 Pa. St. 334.

builder agrees to remedy defects, but the owner corrects the same after acceptance, without giving the builder notice or opportunity to make the repairs, the latter is not liable for the expense of the said repairs."[1] The builder of defective work may generally recover the contract price less the cost of correcting the defects,[2] but not if they prevent realizing the intention of the owner of the building. So, where the work done is useless to the employer, the builder is liable to the extent of the damages incurred by rebuilding, and, if for repairs, for the injury to the house, loss of rent, discomfort, and the expense of obtaining legal redress.[3] But a mechanic is not answerable for defects in a building caused by defectiveness in the plans furnished him by the owner.[4] A builder under contract to do work is bound to execute it in a good and workmanlike manner; and if from want of skill the work is worthless, he is, as has been said before, entitled to nothing, but is liable for any damages his lack of skill may have caused.[5] On the other hand, "the obligation of a contract for work and labor is not annulled or discharged either because it is ascertained before the work is begun that it is unnecessary or useless, or because the employer cannot determine how he would have it done."[6]

§ 30. Acceptance as a Waiver. In general, the ac-

[1] Manfield *v.* Beard, 82 N. Y. 60.

[2] Nolan *v.* Whitney, 12 Week. Dig. 421, 88 N. Y. 648; Woodward *v.* Fuller, 8 N. Y. 312. But not in excess of the contract price less the cost of completion. Phelps *v.* Beebe, 71 Mich. 554, 39 N. W. R. 761.

[3] Somerby *v.* Tappan, Wright (Ohio), 229.

[4] Loundsberry *v.* Eastwick, 3 Phila. 371; Wade *v.* Haycock, 25 Pa. 382; Rohrman *v.* Steese, 9 Phila. 185 (as to defects caused by interference of the owner).

[5] Waul *v.* Hardie, 17 Tex. 553; Hilyard *v.* Crabtree, 11 Tex. 268.

[6] Graves *v.* Caruthers, Meigs (Tenn.), 58, 65.

ceptance of work improperly performed is a waiver of the right to plead the non-performance of the work as a condition precedent, and the contractor may sue for payment.[1] So where the owner of land accepted cottages built for him, he was held on a *quantum meruit* bound to pay for them.[2] Again, where one party contracted with another to do the mason and brick work of a structure for a specified sum, but failed fully to comply with the contract, yet the work performed was reasonably worth the amount claimed, the contractor was allowed to recover on a *quantum meruit* for *substantial* compliance.[3] The general rule is, that if work and materials are accepted, although not coming up to the stipulations of the contract, the acceptor is liable to the extent to which he is benefited upon an implied promise to pay for the value he received.[4] The reasonable value of the materials is to be determined by the jury.[5]

The authorities are somewhat in conflict as to whether

[1] Eldridge *v.* Rowe, 4 Gilm. (Ill.) 91 ; Lindsey *v.* Gordon, 13 Me. 60 ; Smith *v.* Gugerty, 4 Barb. 614 ; Cummings *v.* Pence, 1 Ind. App. 317, 27 N. E. R. 631 ; Beswick *v.* Platt (Pa.), 21 Atl. R. 306 ; Campbell *v.* Hildebrandt, 68 Tex. 22, 3 S. W. R. 243.

Payment of an instalment and partial use is a sufficient acceptance of defective performance to constitute a waiver as to the portion properly completed. Katz *v.* Bedford, 77 Cal. 319, 19 Pac. R. 523. *Contra*, Andrews *v.* Portland, 35 Me. 472 ; Wildey *v.* School Dist., 25 Mich. 419.

[2] Lucas *v.* Godwin, 3 Bing. N. C. 737 ; Parton *v.* Stewart, 2 Aik. (Vt.) 417.

[3] Smith *v.* Gugerty, 4 Barb. 614 ; Lucas *v.* Godwin, 3 Bing. N. C. 737.

[4] McKinney *v.* Springer, 3 Ind. 59, 4 Ind. 79, 5 Ind. 31, 7 Blackf. 399 ; Thomas *et al. v.* Ellis, 4 Ala. 108, 15 Ala. 735, 25 Ala. 54 ; Ford *v.* Smith, 25 Ga. 675. But see Munro *v.* Burt, 8 E. & B. 738, 4 Jur. N. S. 1231 ; Ellis *v.* Hamlen, 3 Taunt. 52 ; Burn *v.* Miller, 4 Taunt. 745 ; Roberts *v.* Havelock, 3 B. & Ad. 401 ; Taylor *v.* Caldwell, 3 B. & S. 826, 835, 32 L. J. Q. B. 164.

[5] Becker *v.* Hecker, 9 Ind. 497, 7 Blackf. 399, 3 Ind. 59, 4 Ind. 79. But see Petrie *v.* Grover, 39 Ind. 343.

the act of taking possession of a building implies an acceptance of the work done. It has been held that where a person accepts a building from a contractor, his acceptance is a waiver of any objection to the location, or to the time and manner of construction;[1] but the better rule is that, where a permanent work is erected on the land of the defendant, a taking of possession by him is not necessarily a waiver of strict performance.[2] The reason of this rule is that, in cases of building contracts, the owner of the land for whom the building is constructed has not the option of refusing or accepting the unfinished building without substantial injury to his estate and loss of the use of the land for the time occupied in the work.[3]

Waiver of the breach of a time-limit stipulation is not necessarily a waiver of other breaches.[4]

§ 31. Deviations from the Original Contract. As has been previously stated in this chapter, the law implies a substantial rather than literal or exact per-

[1] Emerson *v.* Coggswell, 16 Me. 77.

[2] Hartupee *v.* City of Pittsburg, 97 Pa. St. 107; Mitchell *v.* Wiscotta Land Co., 3 Iowa, 209.

[3] Wallis *v.* Smith, L. R. 21 Ch. D. 243, 47 L. T. 389, 31 W. R. 214; Blythe *v.* Poultney, 31 Cal. 233.

In the following case the act of moving into the building was held to amount to an acceptance of the work done, so as to make the owner liable: Galyon *v.* Ketchen, 85 Tenn. 55, 1 S. W. R. 508.

In the following cases it was held that the act of taking possession was not necessarily an acceptance: Badders *v.* Davis, 88 Ala. 367, 6 So. R. 834; Vanderzee *v.* Herman, 13 N. Y. Suppl. 164, 59 Hun, 617; Presbyterian Church *v.* Hoopes, etc. Co., 66 Md. 598, 8 Atl. R. 752; Mohney *v.* Reed, 40 Mo. App. 99; Boteler *v.* Ray, 40 Mo. App. 234; Wildey *v.* School District, 25 Mich. 419.

Continuance to use a building on which alterations are to be made does not operate as a waiver of the performance of a condition precedent. Gove *v.* Island City Co., 16 Or. 93, 17 Pac. R. 740; Yeats *v.* Ballantine, 56 Mo. 530.

[4] Jacksonville, etc. Co. *v.* Woodworth, 26 Fla. 368, 8 So. R. 177.

formance of contracts;[1] and where there are deviations of an immaterial character, which are technical or inadvertent, the builder will not thereby be deprived of his right to recover.[2] Very often the original contract provides that, upon certain conditions, deviations and alterations may be made; or, on the contrary, that if deviations or alterations are made, the builder's charges may be reduced to specified amounts.[3] Sometimes it happens that the original contract has been deviated from in so many matters that it can hardly be regarded as controlling the parties at all, and in such cases the original contract is treated as abandoned, and a new contract is implied to pay the fair or reasonable value of the work or materials.[4] But the provisions of the special contract should govern, as far as it applies.[5] A California decision lays down the rule that "where there has been a special contract to erect a building at a fixed price and according to an agreed plan, and the contract is afterwards deviated from by consent, the plaintiff cannot recover upon the express contract."[6] The authorities, however, do not hold to this rule; for instance, in a Maryland case,[7] where an additional parol agreement was made after a written contract, it was held not to vary the other stipulations of the contract. So in Ohio,[8] where the special contract had been verbally changed by con-

[1] Hayward *v.* Leonard, 7 Pick. 187; Cullen *v.* Sears, 112 Mass. 299.

[2] Glacius *v.* Black, 50 N. Y. 145; Johnston *v.* De Peyster, 50 N. Y. 666.

[3] Turner *v.* Diaper, 2 M. & G. 241, 2 Scott N. R. 447.

[4] Boody *v.* R. & B. R. R. 24 Vt. 660; Pepper *v.* Burland, Peake, 139; Ellis *v.* Hamlen, 3 Taunt. 52; Robson *v.* Godfrey, Holt N. P. C. 236; Austin *v.* Keating, 3 W. R. 288.

[5] Cases cited in preceding note.

[6] De Boom *v.* Priestly, 1 Cal. 206. See Ford *v.* Smith, 25 Ga. 675.

[7] Andree *v.* Bodman, 13 Md. 241.

[8] Goldsmith *v.* Hand, 26 Ohio St. 101.

sent in many respects as to size, form, and materials during the progress of the work, the original contract was upheld. In Indiana[1] the original contract will be binding as far as it can be followed. So again, in Vermont,[2] "where the parties under a special contract deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract, and may be recovered for as such; but it is otherwise if the original terms are applicable, and there is evidence from which it may be inferred that it was the intention of the parties that the new work should be subject to those terms as to times and mode of payment." But if a party to a special contract for building a house consents to a subsequent alteration, he cannot afterwards complain that it was not completed as originally agreed upon.[3]

So where deviations from the original contract and plans are made by mutual consent, and the building is destroyed by its consequent defectiveness, the builders will not be liable.[4] Deviations in the contract as to time of performance, extras, and alterations will be treated of in subsequent chapters.

§ 32. MERGER. The principle of law, that the acceptance of a higher security in place of a lower merges or extinguishes the lower or lesser, applies to

[1] McKinney *v.* Springer, 3 Ind. 59.

[2] Boody *v.* R. & B. R. R., 24 Vt. 660. But "where a contract has been repudiated by both parties, it ceases to be the criterion for measuring the rights and liabilities of the parties to it." Ford *v.* Smith, 25 Ga. 675.

[3] Palmer *v.* Stockwell, 9 Gray, 237.

[4] Clark *v.* Pope, 70 Ill. 128; West Haven Water Co. *v.* Redfield, 58 Conn. 39, 18 Atl. R. 978.

building contracts to the same extent that it does to other agreements absorbed by higher rights. Thus, where parties contract to build a railroad, and afterwards enter into another agreement as to the same matter at another price, it is held that the second contract extinguishes the first.[1] An award does not, however, destroy the original contract further than the award pursues and conforms with the terms of reference.[2] Where specifications are attached to a building contract at the time of its execution, all provisions or contemporaneous agreements as to changes in the specifications are merged in the contract as executed.[3]

§ 33. Rescission. All contracts may be waived, cancelled, or rescinded by an agreement between the parties. A written provision may be rescinded by parol.[4] Sometimes an old contract is so altered in its terms that a new agreement is implied, which operates as a rescission of the old. Thus, where a contractor undertook to complete a building by a certain date or pay a sum as compensation for delay, but while the building was in progress an agreement was made between the parties for additional work, by which it became impossible that the work should be completed by the stipulated time, the court held that the subsequent agreement was so far inconsistent with the original contract as to be virtually a rescission of the agreement to pay for delay.[5]

If a party seeks to rescind or stop the performance

[1] Howard *v.* W. & S. R. R. 1 Gill (Md.), 311.

[2] Walsh *v.* Gilmor, 3 H. & J. (Md.) 383.

[3] Coey *v.* Lehman, 79 Ill. 173; Bragg *v.* Geddes, 93 Ill. 39. But see Cocheco Bank *v.* Berry, 52 Me. 293. See *ante*, § 3.

[4] Kalman *v.* Baylis, 17 Cal. 291.

[5] Thornhill *v.* Neats, 8 C. B. N. S. 831.

of an executory contract, he may do so upon the payment to the other party of such damages as will compensate the latter for being deprived of the right to complete the contract.[1]

Actual misrepresentations made to a vendee of property, and relied upon by him, are ground of rescission;[2] but if, after knowledge of misrepresentation, fraud, or the like, the other party performs his part, all objections to these defences will be considered waived.[3]

A voidable agreement may sometimes rescind a valid contract, if acted upon by the parties.[4]

Where one of the parties to an executory contract expressly signifies his intention not to perform his part of the agreement, the other can treat the contract as rescinded, and has an immediate right of action. But there should be no doubt that the decision was intended as final by the party abandoning the contract.[5]

A special contract is not rescinded by a verbal agreement to pay an additional sum for the work: the subsequent understanding affects only the stipulation as to price; the other stipulations remain in full force.[6]

[1] Danforth *v.* Walker, 37 Vt. 239, S. C. 4 Vt. 257.

[2] Lowry *v.* McLane, 3 Grant (Pa.), 333; Stewart *v.* Dougherty, 1 Pitts. 233.

[3] 1 Brown's Parl. Cas. 289.

[4] Ormes *v.* Beadel, 2 De G., F. & J. 333, 30 L. J. Ch. 1, 9 W. R. 25.

[5] Société, etc. *v.* Milders, 49 L. T. 55. In Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 S. W. R. 18, it was held that, where the contract provided for rescission by the owners whenever the contractor should fail to perform, or it should appear to the engineer that the work was not properly progressing, the rescission by the owners in the latter alternative was not dependent on giving notice to the contractor, and could not be questioned by him.

[6] Cooke *v.* Murphy, 70 Ill. 96; Morrill *v.* Colehour, 82 Ill. 618.

CHAPTER V.

TIME OF PERFORMANCE OF BUILDING CONTRACTS.

§ 34. General Statement. The stipulation usually inserted in this class of contracts, that the building to be undertaken shall be completed, or ready for occupancy, on or before a certain day, is a most important one. In drawing a building contract it is generally advisable not only to bind the builder to complete his work within a certain time, but also to provide against all contingencies which may arise, making due allowances for extras which may be ordered, strikes of mechanics, bad weather, and other causes not under the builder's control.

By the strict letter of common law, the failure of a party to complete the performance by the time agreed upon would virtually allow the other to rescind the contract; yet in equity time is not, in general, considered so much of the substance of the contract that if a building be completed, say, a few days later, no compensation whatever can be recovered.[1] The proper rule seems to be that the builder should be allowed to sustain his suit on the contract, subject to the defendant's equitable right to show any damages he may have sustained by the delay, by way of set-off, or as cause of action in a cross suit.[2]

[1] Porter *v.* Stewart, 2 Ark. 417; Warren *v.* Marus, 7 Johns. 476; Roberts *v.* Berry, 2 De G., M. & G. 284, 22 L. J. C. 398.

[2] Lucas *v.* Godwin, 3 Bing. N. C. 737; Smith *v.* Gugerty, 4 Barb. 614; Lindsey *v.* Gordon, 13 Me. 60; Parker *v.* Thorold, 16 Beav. 59.

So, where a number of cottages were not completed until several days after the time stipulated in the contract, the owner was held bound to pay for them on a *quantum valebat*.[1]

If a land-owner were allowed to profit by the inability of a builder to complete his undertaking by the time specified in the contract, there would be numerous instances where the unfinished structure would be completed by the owner, who would thereby secure the improvement desired, and have the value of his land enhanced partly at the expense of an unfortunate contractor. In simple justice, therefore, the acceptor of uncompleted buildings should be liable to the extent of the fair value of the same, notwithstanding the time stipulation has not been complied with.[2] Equity does not consider that the parties intended that no payment whatever should be made if the building was not completed by the time specified. In other words, "time is not a condition going to the essence of the contract."[3]

Yet, if the parties desire, stipulations may be so worded in unequivocal terms that nothing whatever shall be paid for the building unless completed within the time specified. In such case time becomes an essential condition[4] which will be enforced.[5]

[1] Lucas *v.* Godwin, 3 Bing. 737. In this case there was an acceptance of the work by the employer. See particularly Verzan *v.* McGregor, 23 Cal. 339.

[2] See Addison on Contracts, 582.

[3] Homan *v.* Steele, 26 N. W. R. 472; Lucas *v.* Godwin, 3 Bing. N. C. 737; Littler *v.* Holland, 3 T. R. 590; Maryon *v.* Carter, 4 C. & P. 295; Kingdon *v.* Cox, 2 C. B. 661, 15 L. J. C. P. 95; Tilley *v.* Thomas, L. R. 3 Ch. 67; Parker *v.* Thorold, 16 Beav. 59.

[4] Hudson *v.* Temple, 29 Beav. 536, 30 L. J. C. 251.

[5] Liddell *v.* Sims, 2 Smedes & M. 596; Westerman *v.* Means, 12 Pa. 97; Kent *v.* Humphreys, 13 Ill. 573. A stipulation to fit a house with steam-heating apparatus "with all possible speed" is not a condition pre-

§ 35. Reasonable Time. Where the contract is silent as to the time of performance, the law infers that a reasonable time was meant.[1] What is a reasonable time is usually regarded as a question of law,[2] and therefore for the court; yet sometimes, when dependent upon particular facts, it should be determined by the jury,[3] as where it is to be decided from facts extrinsic to the contract.[4]

If, on the other hand, a builder chooses to bind himself arbitrarily to complete work by a certain time, he may do so, no matter how unreasonable the time; and the court will not infer, even from impossibility of performance, that the time condition had a meaning at variance with its express terms.[5]

When no time is specified for the payment of materials sold, the law infers that they are to be paid for upon delivery,[6] and delivery must be made within a reasonable time.[7]

cedent. St. Louis, etc. Co. *v.* Bissell, 41 Mo. App. 426. In an agreement to make payment conditionally upon the completion of work by a given time, time is of the essence of the contract. Morrison *v.* Wells, 48 Kan. 494, 29 Pac. R. 601. Where the contract instrument provided for completion "without unnecessary delay as soon as ordered," and the specifications for completion "within three months from the date of the contract," the contract instrument was held to be paramount. Boteler *v.* Ray, 40 Mo. App. 234.

[1] Skinner *v.* Bedell's Adm'r, 32 Ala. 44, 3 Ala. 123; Ellis *v.* Thompson, 3 M. & W. 445; Davis *v.* Tallcott, 2 Kern (N. Y.), 184; Atwood *v.* Cobb, 16 Pick. 227, 2 Pa. 63; Driver *v.* Ford, 90 Ill. 595; McCartney *v.* Glassford (Wash.), 20 Pac. R. 423; Liljengren Furniture and Lumber Co. *v.* Mead, 42 Minn. 420, 44 N. W. R. 306; Wilderman *v.* Pitts, 29 Ill. App. 528; Lehman *v.* Clark, 33 Ill. App. 33.

[2] Ellis *v.* Paige, 1 Pick. 43.

[3] See cases cited in Howe *v.* Huntington, 15 Me. 350.

[4] Watts *v.* Sheppard, 2 Ala. 425; Drake *v.* Goree, 22 Ala. 409; Murrell *v.* Whitney, 32 Ala. 55.

[5] Jones *v.* St. John's Col. L. R. 6 Q. B. 115, 40 L. J. Q. B. 80; Oakden *v.* Pike, 34 L. J. Ch. 620.

[6] Brady *v.* Anderson, 24 Ill. 112.

[7] Palmer *v.* Breen, 24 N. W. Rep. 322.

§ 36. PARTICULAR WORDS. Mr. Emden, in his excellent work,[1] cites numerous authorities to show the meaning of particular terms used in building contracts. He explains that "a contract to be performed 'directly' means that it is to be performed, not within a reasonable time, but speedily, or at least as soon as practicable;" that "'forthwith' does not necessarily mean immediately;" that, "in computing a given period of time 'from' and 'after' a specified act or event, the day of the act or event is to be excluded, and the last day of the given time included;" that "the words 'at' or 'on' or 'upon' a certain time or event, or like expressions, mean before, or simultaneously with or after, the act or event referred to, in accordance with a reasonable construction of the context. The term 'months' denotes lunar months." But in the United States, calendar months are generally intended.

§ 37. TIME PENALTIES. It is not the policy of the law to give inequitable construction to stipulations, when, by admitting parol testimony, an intention of the parties may be evinced which will not operate as a hardship upon either of them. So, where a contract contained a provision that, if the work was not completed by a fixed time, the defendant should lose the contract, and also all money due on the same, it was held that, if this clause was inserted under a mistake as to the amount and difficulty of the labor to be performed, it was void, and that it did not deprive the defendant of the benefit of the other clauses.[2] So, again, where the condition was that the contractors

[1] Emden on Building, 166.

[2] Verzan *v.* McGregor, 23 Cal. 339. Yet the law implies that the provisions of a written contract were understood when signed. Clark *v.* Pope, 70 Ill. 128.

should be discharged by an engineer and all pay forfeited, if they failed to comply with all their obligations (one of which was to finish by a certain time), the court held that this provision had no reference to the completion by the time agreed upon, but only to defaults occurring during the progress of the work.[1]

On the other hand, when the time of performance is material, or expressly stipulated to be so, a failure to comply in the time agreed upon will avoid the agreement.[2] "Whether a sum specified in a contract, as a penalty for the non-performance thereof, shall be considered as a penalty or as liquidated damages, is a question of construction," dependent upon the circumstances of the case.[3] Thus, in an action where the contract provided a penalty of $500 for the breach of certain stipulations, the court held that actual damages only could be recovered against the party failing to perform his part.[4] Work accepted by and valuable to the employer may generally be recovered for, though not performed within the time agreed upon.[5]

The penalties incurred by a contractor for non-performance may be set up against his claim on *quantum meruit*.[6]

§ 38. Waiver by Extension of Time may be proved to have been made by verbal agreement, or by conduct of the owner equivalent to a waiver.[7] But such an

[1] Cannon *v.* Wildman, 28 Conn. 490.

[2] Kent *v.* Humphreys, 18 Ill. 573.

[3] Foley *v.* McKeegan, 4 Iowa, 1.

[4] Lord *v.* Gaddiss, 9 Iowa, 265. See Lucas *v.* Snyder, 2 G. Gr. (Iowa) 590.

[5] Davis *v.* Fish, 1 G. Gr. (Iowa) 406.

[6] Marshall *v.* Hann, 2 Harr. (N. J.) 425.

[7] Luckhart *v.* Ogden, 30 Cal. 547; Morrill *v.* Colehour, 82 Ill. 618. Where the work was to be completed at a given time, and the owner to

extension of time will not authorize the contractor to abandon the contract and sue for the value of the work.[1]

Where a building contract stipulated that the builder should complete the work in two months' time,

pay at the same time, the making of payment at that time, though the work was not completed, was held to be a waiver. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. R. 182. A verbal statement that no damages would be claimed if the time limit was not fulfilled was held to be a sufficient waiver in Erskine *v.* Johnson, 23 Neb. 261, 36 N. W. R. 510. In Cooke *v.* Odd Fellows' Frat. Union, 1 N. Y. Suppl. 498, payments on account after expiration of the time limited, with other circumstances, were held to amount to a waiver. In Welch *v.* Macdonald, 85 Va. 500, 8 S. E. R. 711, the contractor's delay was excused because the owners failed at first to furnish proper specifications, and delayed in unloading the pipe contracted for. In Huckenstein *v.* Kelly etc. Co., 139 Pa. 201, 21 Atl. R. 78, the contractor was allowed an extension of time because the defendant railroad failed to put in a siding, as agreed, to enable the contractor to unload on the premises. In King etc. Co. *v.* St. Louis, 43 Fed. R. 768, the plaintiff was to build a bridge on piers erected by the defendant, and the defendant's failure to erect the piers in time was held to excuse the plaintiff for not completing the bridge at the time agreed. In Skelsey *v.* U. S., 23 Ct. Claims 61, the plaintiffs were excused for tardiness caused by the defendant's failure to provide a dam as agreed. In Nourse *v.* U. S., 25 Ct. Claims 7, the defendant was to decide upon a time, and its unreasonable delay excused the plaintiff. Where the owner was to deliver on the ground the lumber for construction within a specified time and failed to do so, the time limit for the contractor was held to be without force, and in its place he was required merely to finish within a reasonable time. Starr *v.* Gregory Mining Co., 6 Mont. 485, 13 Pac. R. 195. In Dannat *v.* Fuller, 120 N. Y. 554, 24 N. E. R. 815, the facts being similar, the owner's delay was 30 days in length, and the court on appeal held the contractor entitled, not merely to an extension of 30 days, but to a reasonable time. On this point, see p. 69, note 5, *infra*. In general, see Malone *v.* Wood (Pa.), 18 Atl. R. 984; Van Stone *v.* S. & B. M'f'g Co., 12 Sup. Ct. R., 142 U. S. 128, where the facts were held to show a waiver; Moline etc. Co. *v.* McDonald, 38 Ill. App. 589; Gutman *v.* Cranch, 134 N. Y. 585, 31 N. E. R. 275; § 40, *infra*. In Clement *v.* Schuylkill etc. Co., 132 Pa. 445, 19 Atl. R. 274, the time limit in a contract to raise a building to the lawful grade was held not removed by a subsequent change in the ordinance prescribing the grade. Acceptance of the work may operate as a waiver of failure to perform within the time limit. Cummings *v.* Pence, 1 Ind. App. 317, 27 N. E. R. 631.

Hayes *et al. v.* Second Bapt. Ch., 3 West. Rep. 330.

and be paid a stipulated rate if he should finish the building before the expiration of that time, or forfeit the same rate if delayed beyond that period, it was held that one clause controlled the other, and that by necessary implication he should be allowed a reasonable time beyond the two months by paying or allowing liquidated damages.[1] In a New York case, where the contractor began work before the foundations were fully ready, and the contract specified that the builders should receive $500 for each day the work was completed before the expiration of five months, it was held that they were not entitled to recover the stipulated sum.[2]

"A mutual agreement to extend the time of performance of a special contract requires no new extraneous consideration to support it. It is promise for promise, and such new and further agreement may be declared upon, and a recovery had for such damages as the breach of it has occasioned, though in excess of what would have arisen under the original contract."[3]

An extension of time will not rescind the stipulation which makes time an essential of the contract; it merely substitutes the new time for the old.[4] Time, though of the essence of the contract, is extended while negotiations are being made between the parties.[5]

§ 39. Effect of Extras and Alterations as to Time.

[1] Fulsom *v.* McDonough, 6 Cush. 208.

[2] Super. Ct. 1882, Mansfield *v.* N. Y. Cent. R. R. Co., 16 Weekly Dig. 275.

[3] Hill *v.* Smith, 34 Vt. 535.

[4] Barclay *v.* Messenger, 43 L. J. Ch. 449.

[5] Webb *v.* Hughes, L. R. 10 Eq. 281, 39 L. J. Ch. 606; Wood *v.* Bernal, 19 Ves. 220; M'Murray *v.* Spicer, L. R. 5 Eq. 527.

It was stipulated, in a contract for altering and repairing a warehouse for a certain amount, that if the work was not completed within three months the builder should pay £5 for every week he delayed completion beyond that period. An action was brought for extra work, but the employer was allowed to set off the penalty against the price of the extra work and deduct it from the contract price.[1] The rule inferred from this decision, however, is not a proper one, for the authorities almost seem agreed that if performance is delayed by the ordering of extra work or alterations, or by interference of the owner or his agent, no claim to penalties can be recovered,[2] unless expressly stipulated in the new contract.[3] So, in a Massachusetts case, where the parties verbally altered the original plan of a house, thereby postponing the work, it was held that this postponement by mutual consent relieved the builder from liability in not completing the structure by the time agreed upon.[4] An obligation to complete specified work by a certain fixed time, once waived by change of plan or extras, no longer binds, and the builder is only bound to finish his undertaking within a reasonable time.[5] After the failure of the stipulation as to time, neither party can abandon the contract

[1] Duckworth *v.* Allison, 1 M. & W. 412; Fletcher *v.* Dyche, 2 T. R. 32; Legge *v.* Harlock, 12 Q. B. 1015.

[2] Westwood *v.* Secretary of State for India, 11 W. R. 261, 7 L. T. N. S. 736.

[3] Jones *v.* St. John's Col., L. R. 6 Q. B. 115. See particularly, Lord *v.* Gaddiss, 9 Iowa, 265, and Lucas *v.* Snyder, 2 G. Gr. (Iowa) 590, where a heavy penalty was construed as void, and actual damages only allowed.

[4] Palmer *v.* Stockwell, 9 Gray, 237. So where a town unreasonably delays to fix the site of the building. Blanchard *v.* Blackstone, 102 Mass. 343. But they can change the location by paying damages. Damon *v.* Granby, 2 Pick. 345.

[5] Van Buskirk *v.* Stow, 42 Barb. 9; Green *v.* Haines, 1 Hilt. 254; Doyle *v.* Halpin, 1 J. & Sp. 352. See p. 66, note 7, *supra*.

without giving the other party a reasonable opportunity to perform his part.[1]

An order for extra work does not necessarily waive the time condition further than to allow the builder a reasonable time for the execution of the new work, unless otherwise stipulated, or the agreement for extras is entirely inconsistent with the original contract, and rendering its strict performance impracticable.[2] So, if a builder agrees to do certain work, subject to alterations, he is excused from the performance of the original contract within the prescribed time if alterations or extras are ordered which will, to the employer's knowledge, prevent him from completing according to contract.[3]

A builder can so bind himself by a contract to perform work by a specified time, and to make any alterations which may be ordered by the owner of the building, no matter how arbitrary they may be, and by special covenant so stipulate that the entire work, including extras and alterations, shall be included in the time condition, that not even the fact of the work becoming impossible will excuse him. "It may be an unusual and unwise contract to enter into," said Mr. Justice Hannen,[4] "but there is no reason why a man should not enter into such a contract. Certainly, if he does in direct terms enter into a contract to perform an impossibility subject to a penalty, he will not be excused because it is an impossibility."

[1] 6 Lawson *v.* Hogan, 93 N. Y. 39.

[2] Westwood *v.* Secretary of State for India, 11 W. R. 261, 7 L. T. N. S. 736.

[3] Ibid.; Legge v. Harlock, 12 Q. B. 1015, 18 L. J. Q. B. 45; Fletcher *v.* Dyche, 2 T. R. 32; and other illustrations of the rule cited in Emden on Building, 168.

[4] In Jones *v.* St. John's College, L. R. 6 Q. B. 115, 40 L. J. Q. B. 80.

§ 40. Other Excuses for Delays. Where one of the parties is to supply suitable materials, but fails to do so promptly, he cannot complain of delay of the other party caused thereby.[1] Mutual assistance is always understood in building contracts where the work is to be partly performed by the owner or other contractors; and whether the contract so stipulates or not, the stipulation as to completion by a specified time will be waived by the owner or his agents in not keeping the other portions of the work sufficiently advanced to enable the other party to perform his part.[2] Or, if work is done under the eye of one of the parties contracting to pay and is accepted by him, this will be an excuse for delay, and payment must be at the contract price.[3]

The builder is excused for delays caused by unavoidable accidents.[4]

§ 41. Measure of Damages. The standard for estimating damages, in case the owner sustains losses by the failure of the builder to complete work at the time

[1] Bulkley *v.* Brainerd, 2 Root (Conn.) 5. See note to § 38.

[2] Weeks *v.* Little, 11 Abb. N. C. 415; Taylor *v.* Renn, 79 Ill. 181; Smith *v.* Boston, C. & M. R. R., 36 N. H. 458; Stewart & Howell *v.* Keteltas, 36 N. Y. 388.

[3] Adams *v.* Hill, 16 Me. 215.

[4] Bailey *v.* Stetson *et al.*, 1 La. Ann. 332 (delivery of a boat prevented by an accident). Where the completion by a given time was conditioned on "no interference from labor strikes," it was held that the contractor was not excused by an abandonment of work by the mechanics owing to the contractor's failure to pay wages as agreed. McLeod *v.* Genius, 31 Neb. 1, 47 N. W. R. 473. See p. 50, note 2, *supra*.

It is no defence, in an action against the promisor's executors on a contract to build within a year, that the promisor died before the year expired. Appeal of McDaniel (Pa.), 12 Atl. R. 154. Where no extension of time, even for unavoidable accident, was to be allowed for, except after written claim made at the time, it was held that no unavoidable accident could excuse delay, where no written claim had been made. Brown *v.* Strimple, 21 Mo. App. 338.

specified, is a fair rental of the property for the time delayed. Speculative profits are too remote to be considered unless clearly incidental.[1]

On the other hand, if the contractor is prevented from completing his contract by interference and defaults of his employer, he is not restricted to a *pro rata* share of the contract price, but may recover what his work and materials are reasonably worth.[2]

[1] Abbott *v.* Gatch, 13 Md. 314. See McConey *v.* Wallace (Mo. App.), 4 West. Rep. 843, 846.

[2] Fitzgerald *v.* Hayward, 50 Mo. 516; Ehrlich *v.* Ætna Ins. Co., 4 West. Rep. 40; as well as loss of time and rental value expended, through failure, *e. g.*, of the owner to furnish the contractor with tools; Graves *v.* Glass (Iowa), 53 N. W. R. 231. But see Ahern *v.* Boyce, 2 West. Rep. 405. See, further, § 68.

CHAPTER VI.

SPECIFIC PERFORMANCE OF BUILDING CONTRACTS.

§ 42. GENERAL CONSIDERATIONS. The only remedy at law for the breach of a contract is an award of damages.[1] In many cases the recovery of damages is an inadequate remedy, and nothing short of an actual accomplishment of the stipulations of the contract will satisfy the purposes of the agreement. From this inadequacy of the law to remedy a violation of these particular contracts arose the doctrine of enforcement of specific performance by courts of equity. When, therefore, from the nature of the relief sought, substantial performance of a covenant will alone answer the purposes of justice, a court of equity will compel specific performance, instead of merely leaving the injured party to partial redress by damages.[2] But this rule applies only to those cases where the law can give no adequate remedy,[3] and the decree is discretional with the court.[4]

§ 43. EARLIER PRACTICE. "The earliest trace of the jurisdiction," says Mr. Emden,[5] "is a dictum of

[1] Parsons on Contracts, 350.

[2] Stuyvesant *v.* The Mayor, 11 Paige (N. Y.), 414; 1 Maddock Ch. Pr. 295; 2 Story Eq. § 717; Penn. Co. *v.* Delaware Co., 31 N. Y. 91; Scott *v.* Billgerry, 40 Miss. 119.

[3] Finlay *v.* Aiken, 1 Grant (Pa.), 83; The Justices *v.* Corft, 18 Ga. 473.

[4] Ash *et al. v.* Daggy, 6 Ind. 259; Roundtree's Adm. *v.* McLain, 1 Hempst. (Ark.) 245; Pickering *v.* Pickering, 38 N. H. 400; Young *v.* Daniels, 2 Iowa, 126.

[5] Emden on Building, 233.

Justice Genney, in the Year Book of 8 Edward IV., that a promise to build a house would be specifically enforced.[1] Lord Hardwicke's opinion was that, upon a covenant to build, a landlord might come into equity for specific performance, as the not building took away his security.[2] And a prior case is to be met with in which such a decree was pronounced.[3] So, in another case, an agreement to build was specifically enforced against a tenant who, having undertaken to rebuild the farmhouse, had done so on his own soil instead of his landlord's."[4]

Mr. Justice Story, in his work on Equity Jurisprudence,[5] forcibly sets forth many strong reasons in favor of specific enforcement of those building contracts in which the stipulations are sufficiently definite and exact to be substantially followed. "It is by no means clear," he says, "that complete and adequate compensation can in such cases be obtained at law: for, if the suit is brought before building or rebuilding by the party claiming the benefit of the covenant, the damages must be quite conjectural, and incapable of

[1] 1 Madd. Ch. Pract. (3d ed.) 467. Lord Justice Fry has very properly pointed out (in his work on Specific Performance, § 19) that this rendering should probably be, "if I promise to *make over to you* a house" (*faire a vous un meason*), and that thus the passage does not refer to specific performance by construction. What he has omitted to note, and what finally destroys the value of the passage as an authority, is that the speaker Genney (or more properly Jenney) was at the time not a judge, but only one of the counsel. He did not receive a seat on the bench until at least 1477 (Foss says 1481), while the above case occurred in 1468. Moreover, he then went to the King's Bench; the above suit was in Chancery. For citations of a few early cases of the enforcement of building contracts, see Fry, Specific Performance, §§ 65, 76; Hudson, Building Contracts, p. 250.

[2] City of London *v.* Nash, 3 Atk. 512, S. C. 1 Ves. Sr. 12.

[3] Allen *v.* Harding, 2 Eq. Cas. Ab. 17, pl. 6, 1 Fonbl. Eq. b. 1, ch. 3, § 7, n.

[4] Pembroke *v.* Thorpe, 3 Swanst. 437, 443, n.

[5] Story's Eq. Jur. § 728.

being reduced to any absolute certainty; and if the suit is brought afterwards, still the question must be left open, whether more or less than the exact sum required has been expended upon the building, which inquiry must be at the peril of the plaintiff. In the next place, such a covenant does not admit of an exact compensation in damages from another circumstance, — the changing value of the stock and materials at different times, according to the various demands of the market. In the last place, it seems against conscience to compel a party, at his own peril, to advance his own money to perform what properly belongs to another, when it may often happen, either from his want of skill or means, that, at every step, he may be obliged to encounter personal obstacles, or to make personal sacrifices, for which no real compensation can ever be made." He concludes by a strong indorsement of the doctrine of the Earl of Rosslyn, in the case of *Mosely* v. *Virgin*.[1] In this *causè célèbre* his lordship laid down the reasonable distinction, that, if the contract expressed distinctly what sort of a house was agreed to be built, so that the court could describe it as a subject for the report of the master, specific performance might be decreed; but if the description in the contract was loose and undefined, the court would not assume to reduce it to certainty, and the party must be left to his remedy for damages.[2]

[1] Mosely *v.* Virgin, 3 Ves. 184. See, also, Cubitt *v.* Smith, 10 Jur. N. S. 123. The Earl of Rosslyn was, at the time of his decision in Mosely *v.* Virgin, Lord Loughborough.

[2] In this case (Mosely *v.* Virgin, *supra*), the contract was to expend £1,000 in building. The court held this indefinite, adding: "I suppose a house was meant, but it is not said whether a manufactory would have answered or not. . . . But I concur in the cases which lay down that, if the thing contracted to be done can be made reasonably clear, the court is bound to enforce it." See, for example, Hepburn *v.* Leather, 50 L. T. 660.

Romilly, Master of the Rolls, held that a contract for building a house could not generally be specifically enforced, owing to the difficulties in determining whether the decree was or was not performed.[1] In the general run of cases, the real motive of those persons who seek for a specific performance of building contracts, though setting forth particular and personal reasons for their desire that the builder whom they had selected for the work should perform the same and that no one else would do, is to secure the enforcement of a good bargain, — not because any other builder could not do as well, but because the defendant had contracted to do the work for less money than they could get any one else to do it for, and less than it is really worth.[2]

§ 44. Building Contracts Sometimes Enforced. The contract for building a house has thus sometimes, but rarely, the requisites which should recommend it for a decree of specific performance. Where the contract is simply to make repairs which could be done by any competent mechanic, there is no substantial reason why the court should entertain such an application; for an award of damages which could be secured at law is certainly adequate to remedy the breach. But where the contract sought to be specifically enforced relates to building upon leased land, where the security to the landlord has been destroyed by fire,[3] or where the defendant has sought to avoid a lease by building upon his own land,[4] or otherwise

[1] Brace *v.* Wehnert, 25 Beav. 348; Soames *v.* Edge, 1 Johns. (Eng.) 673.

[2] 1 Fonbl. Eq. (5th ed.) 353, n.; Pembroke *v.* Thorpe, 3 Swanst. 437, n.; Society *v.* Butler & Taylor, 1 Beasl. Ch. (N. J.) 498.

[3] City of London *v.* Nash, 3 Atk. 512.

[4] Allen *v.* Harding, 2 Eq. Cas. Ab. 17, pl. 6.

injured a material interest of the plaintiff, so that proper compensation cannot be given in damages, the court should exercise its discretional power, and decree specific performance.[1]

It is well settled that a court of chancery has jurisdiction to compel the specific performance of a contract, made for a valuable consideration, to build or improve land belonging to the defendant for the benefit of the plaintiff who is the owner of adjoining property, and whose interest in having such erection or improvement made is of such a nature that a violation of the covenant cannot be adequately remedied by an award of damages.[2] Upon the same principle, the court has decreed specific performance of a contract to construct a certain roadway across lands;[3] to keep the banks of a river in repair;[4] to construct and maintain a depot upon certain land;[5] to build a side track;[6] to build a roadway and wharf[7] upon adjoining land; and to construct an archway.[8]

Where the plaintiff has parted with his lands subject to certain conditions, having no authority himself to comply with these conditions, the equity courts will generally exercise jurisdiction, and compel specific

[1] Storer *v.* G. W. Ry., 2 Younge & C. C. C. 53; Stuyvesant *v.* The Mayor, 11 Paige (N. Y.), 414.

[2] Stuyvesant *v.* The Mayor, 11 Paige (N. Y.), 414.

[3] Sanderson *v.* Cockersmouth etc. Ry. Co., 11 Beav. 497; Lytton *v.* G. N. Ry. Co., 2 K. & J. 394.

[4] Kilmorey *v.* Thackery, 2 Bro. Ch. 65.

[5] Hood *v.* N. E. Ry. Co., L. R. 5 Ch. 525; see Todd *v.* Midland etc. Ry. Co., 9 L. R. (Irish) 85. *Contra*, see Blanchard *v.* Detroit R. R. Co., 31 Mich. 43.

[6] Greene *v.* W. C. Ry. Co., L. R. 13 Eq. 44, 41 L. J. Ch. 17; Woodruff *v.* Brecon etc. Ry. Co., W. N. (1884) 208, 231, 54 L. J. Ch. 29, 51 L. T. 536.

[7] Wilson *v.* Furness Ry. Co., L. R. 9 Eq. 28, 39 L. J. Ch. 19; Firth *v.* Midland Ry. Co., L. R. 20 Eq. 100.

[8] Storer *v.* G. W. Ry., 2 Younge & C. C. C. 53.

performance.[1] Thus, where one agreed to sell a certain lot, provided the purchaser would build a convenient road over it for the use of the seller, and would also lay out £3,000 in buildings and improvements, the court declared that the condition pertaining to the building of the road could be specifically enforced.[2] So, also, with agreements to alter a house to correspond with adjoining houses.[3]

Specific performance of a contract may be ordered where the building has been partly completed and, if the court does not thus interfere, will remain unfinished;[4] but these cases must necessarily be rare, as full compensation can be had in damages.

§ 45. Building Contracts Not Usually Enforced. But it may be stated as a general rule, subject to the above noteworthy exceptions, that courts of equity will rarely order specific performance of building contracts.[5] The reason of this is that adequate relief in such cases can generally be given by an award of damages at law, and an agreement to build a house can be performed as well by one builder as by another. Equity interferes only where performance *in specie* is necessary and justice cannot be had in any other way.[6] The court considers whether an enforcement of a contract is practicable and can be judicially carried out,[7] realizing that to exact specific performance of many

[1] South Wales Ry. Co. *v.* Wythes, 1 K. & J. 200, and cases cited *supra*.

[2] Wells *v.* Maxwell, 32 Beav. 408, 419, 9 Jur. N. S. 1021.

[3] Franklyn *v.* Tuton, 5 Madd. 469; Lord Manners *v.* Johnson, L. R. 1 Ch. Div. 673, 45 L. J. Ch. 404.

[4] Price *v.* Corporation of Penzance, 4 Hare, 506, 509.

[5] Kay *v.* Johnson, 2 H. & M. 118; Cooper *v.* Jarman, L. R. 3 Eq. 98.

[6] Paxton *v.* Newton, 2 Sm. & Giff. 437; Reeves *v.* Cooper, 1 Beasl. Ch. (N. J.) 224.

[7] 2 Story Eq. Jur. §§ 731–735; Craven *v.* Tickell, 1 Ves. Sr. 60; Pollard *v.* Clayton, 1 K. & J. 462.

building contracts would be undertaking to enforce exact fulfilment of agreements hampered by almost insurmountable difficulties in the complicated operations of builders, architects, contractors, sub-contractors, and others.[1]

Where a deed to a railroad company provided that it should erect a convenient bridge over the premises, to be selected by the grantor, but did not fix the time of performance, the latter's failure to designate the site within a reasonable time, and neglect to call on the company for twenty years, was taken as such laches as to preclude the grantor from a decree for specific performance.[2] In a Michigan case the court refused a decree of specific performance on an agreement by a railroad to erect and maintain a station on certain ground granted by the plaintiff, and to run trains from the station every day.[3] So, again, where the defendants contracted to give a conditional bond, but the original agreement was of such a character that courts of equity would not compel specific performance, the court refused to enforce the condition *in specie*.[4] So, where it was covenanted that the owner should transfer certain lands to the builders, reserving a fixed rent, and the contract stipulated that £1,000 should be expended in building, or certain penalties forfeited, the court dismissed the petition praying specific enforcement, on the ground of uncertainty.[5]

[1] Clarke *v.* Glasgow Assurance Co., 1 M'Queen, 668.

[2] Williams *v.* Hart, 116 Mass. 513; Johnson *v.* The Board of Commissioners of Somerville, 6 Stewart, 152.

[3] Blanchard *v.* Detroit R. R. Co., 31 Mich. 43.

[4] South Wales Ry. Co. *v.* Wythes, 1 Kay & J. 186, 200, 31 Eng. L. & Eq. 226.

[5] Mosely *v.* Virgin, 3 Ves. 184. In Kendall *v.* Frey, 74 Wis. 26, 42 N. W. R. 466, the court refused to enforce a contract to erect the City Hall on the plaintiff's land. A contractor cannot compel a municipal corporation

A contract by a railroad company to locate its terminus, machine-shops, and principal offices permanently in a particular city will not be enforced if it is to be construed as calling for perpetual maintenance, without regard to the best interests of the railroad and the public.[1]

It almost seems unnecessary to add that courts of equity will decree specific performance in no case where satisfactory relief can be had by compensation in damages;[2] as, where a railroad company failed to conform with its contract to build a station in a certain place, it was held that any injury inflicted thereby upon the plaintiff could be compensated for in damages.[3]

The distinction between a contract to build a house and to repair one may not always be worth drawing; although it has been argued that whereas one builder can repair a house as well as another, a person has the right to insist that the very man, and no other, shall build his house.[4] In point of fact, the difficulties attaching to a contract to build, or to one to repair, vary with the circumstances of the case. For instance,

to proceed with the erection of a building which they have contracted to allow him to build. Lord *v.* Thomas, 64 N. Y. 107.

[1] Texas P. R. Co. *v.* Marshall, 136 U. S. 393. Cf. also, Conger *v.* R. Co., 45 Hun, 296. But in Minneapolis etc. R. Co. *v.* Cox, 76 Iowa, 306, 41 N. W. R. 24, where the defendants agreed to convey land, and the plaintiffs to erect and maintain a depot, the objection of want of mutuality, in a suit to compel conveyance, was overruled, and the power to compel the erection of the depot was asserted.

[2] The Justices *v.* Corft, 18 Ga. 473; 2 Story Eq. Juris. § 718.

[3] Wilson *v.* Northampton Ry. Co., L. R. 9 Ch. App. 279, 43 L. J. Ch. 503.

[4] Parsons on Contracts, 350 *et seq.* n. 9; 1 Fonbl. Eq. (5th ed.) 353, n.; Flint *v.* Brandon, 8 Ves. 159; Lucas *v.* Comerford, 1 Ves. Jr. 235 (covenant to rebuild), 3 Bro. C. C. 166; Pembroke *v.* Thorpe, 3 Swanst. 437, 443, n.

it requires more skill to make $20,000 worth of artistic repairs, according to certain specifications, etc., than it does to build a $400 house. The distinction, therefore, is unreal, and has nothing to support it. It is almost uniformly held, however, that *contracts for repairs* cannot, or rather should not, be specifically enforced.[1]

§ 46. The Supreme Court of the United States has failed to uphold the distinction between contracts which relate to realty and those which relate to personalty,[2] and our State courts have generally followed the same policy. I do not, therefore, deem it advisable to dwell upon the difference in the specific enforcement of contracts to these classes of property; for while in England the subject is an important one, in this country the same rules apply to both.

[1] Raynor *v.* Stone, 2 Eden, 128; Hill *v.* Barclay, 18 Ves. 56; Lord Abinger *v.* Ashton, L. R. 17 Eq. 376; Beck *v.* Allison, 56 N. Y. 367.

[2] See Barr *v.* Lapsley, 1 Wheat. 151; Mech. Bank *v.* Seton, 1 Pet. 299; 2 Story Eq. Juris. § 724.

CHAPTER VII.

EXTRAS.

§ 47. General Statement. It is usually found advisable to stipulate specially in building agreements that no alterations or additions shall be made without the consent of the owner.[1] Sometimes, however, the contract provides that the builder shall execute any additions or alterations ordered by the architect or owner, and that they shall be valued, when the job is completed, at their fair value, or by arbitration and award. Perhaps any one having only a cursory knowledge of building operations would fall into the error of agreeing to such a stipulation, considering at the same time that nothing is more reasonable than that anything ordered by the owner of the building should be valued at the end of the work. Experience, however, keeps a dear but a good school, and those who have a broader knowledge of such transactions agree that, by some mysterious process of calculation, things valued afterwards in that way always cost a great deal more than if contracted for beforehand. In general, the ordering of the extra work must be made by a properly qualified agent of the person to be charged.[2]

[1] Baltimore Cemetery Co. *v.* Coburn, 7 Md. 202; Abbott *v.* Gatch, 13 Md. 314; Franklin *v.* Darke, 3 Foster & Finlason, 65; Russell *v.* Bandeira, 32 L. J. (N. S.) C. P. 68, 13 C. B. N. S. 149, 7 L. T. N. S. 804; Myers *v.* Sarl, 3 Ellis & Ellis, 306, 30 L. J. Q. B. 9.

[2] Starkweather *v.* Goodman, 48 Conn. 101; Queen *v.* Starrs, 17 Can. Sup. Ct. 118. In Shaw *v.* First Baptist Church, 44 Minn. 22, 46 N. W. R. 146, the claim was disallowed where the extra work was ordered by two out of five members of the committee, instead of by the superintend-

Much that has been said in Chapter III., § 12, upon architects' certificates will be applicable to the subject of extras, as defining their authority to order additions, alterations, etc.

Where extra work was ordered by an architect to the knowledge of the employer, it was held that there was sufficient evidence of an implied authority and new contract to pay for the extras.[1]

§ 48. SPECIAL STIPULATIONS TO AVOID EXTRAS. Where the contract provides that extras shall not be charged for without a written order, nothing but a written order will support the claim.[2] So, where the contract provided that, if any changes or extras not in the contract were made or called for, their cost should be determined by supplemental contract, it was held that no claim for extras could be sustained except the same were specified *in writing*, or an express waiver of that provision of the contract clearly shown.[3] In such suit

ent and committee. See Sexton *v.* Cook Co., 114 Ill. 174 (where the architect and joint committee of the city and county authorities ordered the extra work without right). Where a Board of County Commissioners had power to appoint a superintendent to act for them in the supervision of the work, deviations involving extra work were held to have been lawfully authorized by him. Com'rs *v.* Motherwell, 123 Ind. 364, citing cases in that State. *Contra:* Supervisors *v.* Patrick, 54 Miss. 240.

[1] Wallis *v.* Robinson, 3 F. & F. 307. It should be remembered that where the agreement stipulates that extras are to be paid for at the architect's valuation, this gives him implied authority to order and determine what are extras. Richards *v.* May, L. R. 10 Q. B. D. 400, 52 L. J. Q. B. 272, 31 W. R. 708.

[2] Cases cited *supra*, and Thames Iron Works Co. *v.* Royal Mail Co., 8 Jur. N. S. 100, 31 L. J. C. P. 169, 13 C. B. N. S. 358. A failure of the contractor to make claim in writing to the architect before the next ensuing payment will prevent his recovery; O'Keefe *v.* Corporation, 59 Conn. 551, 22 Atl. R. 325; or to have the alteration specified in writing; Condon *v.* Jersey City, 14 Vroom 452; or to obtain the written order of the owner, as required by the contract; Sutherland *v.* Morris, 45 Hun, 259.

[3] Trustees *v.* Platt, 5 Brad. (Ill.) 567.

the pleadings should show that the extras charged for were expressly authorized by the owner, or that they were so distinct from the contract that a new promise would be implied from the acceptance thereof.[1] So, where the contract specified that "it was mutually agreed that, should any alterations be made from the present design, it may be done, provided the parties beforehand agree upon the price, and indorse it upon the contract, and unless such agreement be so entered it is to be taken to be an agreement to make the alterations without any change of price of the original contract," it was held that the builder could not recover for erecting two windows not in the contract.[2] So where the contract stipulated "no extra charges to be made unless a written agreement be attached to the contract," it was held that this clause protected the owner from extras unless the order was not only given but attached as specified, and that it did not alter the case although the work was ordered by the owner of the house.[3] But a builder may recover for extra work if ordered and accepted, and wholly *independent* of the contract.[4] Not, however, if the extra work was incidental to the contract. Thus it was held in Vermont under a contract providing that no charge should be made for extra work "unless same shall have been done in pursuance of a written contract, or orders signed by engineer," and that orders should be presented within

[1] Duncan *v.* The Board etc., 19 Ind. 154.

[2] Baltimore Cemetery Co. *v.* Coburn, 7 Md. 202.

[3] Abbott *v.* Gatch, 13 Md. 314. In Badders *v.* Davis, 88 Ala. 367, 6 S. R. 834, there was a substitution of work; but its excess of value over that of the work replaced was allowed, though the contract required extras to be based on signed orders, and only verbal ones had been given. Cf. Goodwin *v.* McCormick, 6 N. Y. Suppl. 662.

[4] Chambers *v.* King & Tunstall, 8 Mo. 517. See particularly, Boody etc. *v.* R. & B. R. R., 24 Vt. 660.

a given time, that a failure to comply with any of these conditions would bar recovery.[1]

So, where the contract provided that a written order should be given by the owner before any additions or alterations were made, it was held that the builder could not recover without the previously written order.[2] Equity will give no relief for the mere want of writing, for the condition will be as strictly upheld in courts of chancery as in those of common law.[3] Both equity and law presume that the parties understood the provisions of the contract when they signed it.[4]

Sometimes it is made an essential that the architect's certificate should be procured before payment can be made for any work.[5] In such case the certificate must be secured, or the party seeking payment must show a good reason for failing to do so.[6]

Where the contract expressly provided that no extras should be incurred without a written order of the owner's engineer, it was held that extra work done during the progress of the contract, of which particulars were stated upon the certificates issued from time to time by the architect, was not thereby authorized, and could not be recovered for, as these certificates were not counted as written orders.[7] Such a rule

[1] Vanderwerker *v.* Vermont Cent. R. R., 27 Vt. 130. See, also, Russell *v.* Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. 68, 7 L. T. N. S. 804.

[2] Russell *v.* Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. 68, 7 L. T. N. S. 804.

[3] Kirk *v.* Bromley Union, 2 Phill. 640, 17 L. J. (N. S.) Ch. 127; Richards *v.* May, L. R. 10 Q. B. D. 400, 52 L. J. Q. B. 272.

[4] Abbott *v.* Gatch, 13 Md. 314.

[5] See Chapter IV.

[6] Mills *v.* Weeks *et al.*, 21 Ill. 568; Bottems *v.* Mayor etc. of York, 93 Law Times, at 268 (where the work proved too expensive, and the contractor, abandoning and suing for extra work and labor, was met by a provision that the engineer was to decide as to extra work).

[7] Tharsis S. & C. Co. *v.* McElroy, L. R. 3 App. Cas. 1040; and to the

would not be adopted for a final certificate of an architect, where he is authorized to give it; for, should his certificate as to the balance due include extras, it would be binding upon both the owner and the builder.[1]

§ 49. PRICE OF THE BUILDING NAMED IN THE CONTRACT. EFFECT OF TENDERS. It frequently happens, especially in those cases where the proposed work is submitted by advertisement for competitive bidding, that the builder undertakes to do the entire job for a fixed price. In other words, he makes or accepts an offer to build according to certain plans and specifications for an amount of money named in the contract. This is usually called, among persons engaged in the building trade, making or accepting a TENDER. It is but fair that the party who is to pay for the house or other edifice should know precisely beforehand what it is going to cost him; and yet so complicated are the obligations arising out of an extensive building contract that many contractors, in their eagerness to obtain large contracts, allow errors to creep into their estimates. These they discover too late to withdraw, and consequently find themselves bankrupt before the completion of their undertakings.[2]

It seems well settled that, if a builder agrees to erect a building for a certain price and of a certain quality of materials, but in constructing the same furnishes extra work and better materials, he cannot recover more than the original contract price. It is work voluntarily done, and materials voluntarily sup-

same effect see Lamprell *v.* Billericay Union, 3 Exch. 283, 18 L. J. Ex. 282.

[1] Brunsdon *v.* Stames Local Board, 1 Cab. & El. 272. See *ante*, § 47; *post*, §§ 51–54.

[2] See note 2, *post*, p. 92.

plied, for which no recovery can be had.[1] No matter how meritorious the extra work may have been, or how beneficial to the estate, if it was done without the authority, privity, or consent of the owner, no action for its value can be sustained. For where a mechanic undertakes to do a job of work at a stipulated price upon certain representations, if, upon seeing what is actually to be done, he discovers that the work cannot be done without involving expense beyond his estimate, it is obligatory upon him to notify the other party before he proceeds, or he will do the work at the peril of not being paid.[2]

"A person," said Lord Tenterden, in *Lovelock* v. *King*,[3] "intending to make alterations, generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking, and it will very frequently depend on this estimate whether he proceeds or not. It is, therefore, a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce an increase of labor and expenditure, and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract."

This rule has generally been deemed but equitable, but there are cases in which it has been rigidly upheld, to the great hardship of builders. For instance, in a

[1] Trustees etc. *v.* Bledsoe, 5 Ind. 133, 38 Ind. 140. See, also, the opinion of Lord Tenterden in Wilmot *v.* Smith, C. & P. 453, and in Lovelock *v.* King, 1 Moody & R. 60; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28; Hart *v.* Norton, 1 McCord, 22; Wilmot *v.* Smith, C. & P. 453.

[2] Martine *v.* Nelson, 51 Ill. 422.

[3] Lovelock *v.* King, 1 Moody & R. 60.

Connecticut case, where a man contracted to build a railroad conformably to the directions of an engineer, and appended his estimates of cost to the contract, the actual cost proved more than the estimate, yet the engineer required depot buildings costing more than one thousand dollars over his estimates; and the court held that "the contractor could claim nothing for extra costs, as the contract appeared to be fairly made, and the contractor ran the risk when he executed it." [1]

§ 50. EXTRAS INDEPENDENT OF THE CONTRACT. It sometimes occurs that the extra work may be made to appear as entirely independent of the original contract, in which case recovery may be had upon a *quantum meruit* upon the implied contract to pay for that which is ordered or accepted.[2] Thus it was held, where an agreement is made for a building, it becomes a law to both the parties; but whatever additions and alterations are made in the plans form a new contract, either express or implied.[3]

So, in an Illinois case, where a mason was ordered to take down more wall than his contract called for, although necessary to make his work durable, the contractor was held liable for extra work.[4]

[1] Cannon *v.* Wildman, 28 Conn. 491. See note 2, *post*, p. 92.

[2] McCormick *v.* Connolly, 2 Bay (S. C.), 401; Dubois *v.* Delaware & Hudson Canal Co., 12 Wend. 334; Mowry *v.* Starbuck, 4 Cal. 274.

[3] McCormick *v.* Connolly, 2 Bay (S. C.), 401.

[4] Donlin *v.* Daegling, 80 Ill. 608. When alterations of plan are made by the owner, the claim for extras is not defeated by a clause binding the contractor to furnish "all materials and labor." Cassidy *v.* Fontham, 14 N. Y. Suppl. 151. A claim for extra work is not justified merely by the fact that the contractor has, at the owner's request, given an amount of time to superintendence greater than he would otherwise have given, when the contract already imposed on him a duty of supervision, and the time actually given was not more effective than was required. Kinsley *v.* Charnley, 33 Ill. App. 553. But the fact that a house would not have been well plumbed is not necessarily fatal to a claim for plumbing extras

The cases in which a new contract can be set up, and recovery had in *indebitatus assumpsit*, are those in which the work done is entirely outside of the scope of the general contract, yet to a certain extent dependent upon it. The plaintiff will have to show conclusively that the work was entirely distinct from the contract, if the latter provided against extras.[1] His claim must be such as will stand upon its own merits, as if the special contract had not been made.[2] So, where the written contract was afterwards greatly deviated from, it was held that the party could not sue thereon, but must bring an action on an implied contract, and that at the trial damages might nevertheless be awarded according to the terms of the original contract.[3] In another case,[4] where the original contract was abandoned by the contractors jointly, but afterwards the house was built by one of the parties and two other builders, it was held that the price for building the house was not to be ascertained by the original contract, although the same party owned the building.

§ 51. EXTRAS IMPLIEDLY AUTHORIZED. Where alterations are made under the eye of the owner, with his apparent acquiescence, and extras added to such an extent that he must be aware that additional expense has been thereby incurred, and that they cannot pos-

where they have been expressly ordered. Cassidy *v.* Fontham, 14 N. Y. Suppl. 151.

[1] Buxton *v.* Cornish, 1 D. & L. 581, 12 M. & W. 426; Vincent *v.* Cole, Moody & M. 257, 3 C. & P. 481.

[2] Thornton *v.* Place, 1 Moody & R. 218; Fletcher *v.* Gillespie, 3 Bing. 637.

[3] In De Boom *v.* Priestly, 1 Cal. 206; Jones *v.* Woodbury, 11 B. Mon. (Ky.) 167; Clark *et al. v.* The Mayor etc., 4 Comst. (N. Y.) 338; White *v.* Oliver, 36 Me. 93.

[4] Tebbets *v.* Haskins, 16 Me. 288.

sibly be done at the contract price, recovery may be had upon a *quantum meruit*.[1] So, also, an authority will be implied where he superintended the work, or saw the materials used under such circumstances that he had no reason to believe that they were to be added or substituted without additional cost, and did receive the same.[2]

A provision that no claim for extras shall be valid unless based on the written order of the superintending engineer may be waived by an order given verbally by the engineer.[3]

If the party for whom a building is in course of erection should receive estimates for certain extras, alterations, etc., and subsequently order the same, he would be held liable for the price thereof, according to the estimates.[4] Again, it has been held that compensation will be allowed in all cases for extra work, where the work is absolutely necessary to the prosecution of the undertaking.[5] Yet such is not an invariable rule, for the English authorities seem to agree that, when details indispensable for the completion of

[1] Lovelock *v.* King, 1 Moody & R. 60.

[2] Ibid., and Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28.

[3] Elgin *v.* Joslyn, 36 Ill. App. 301 and 26 N. E. R. 1090; Bartlett *v.* Stanchfield, 148 Mass. 394, 19 N. E. R. 549; Erskine *v.* Johnson, 23 Neb. 261, 36 N. W. R. 510; McLeod *v.* Genius, 36 Neb. 1, 47 N. W. R. 473. *Contra*, Ahern *v.* Boyce, 19 Mo. App. 552.

In Close *v.* Clark, 9 N. Y. Suppl. 538, a departure from the original plan with assent of the owner or a notice by the latter at the expiration of the time to go on and complete was held a sufficient waiver. See Hogan *v.* Burton, 7 N. Y. Suppl. 722. No claim for extra work can be made where the work in question was ordered by the owner's superintendent under a power to inspect and reject, and the contractor did not at the time give notice that he should regard it as extra work. Bowe *v.* U. S., 42 Fed. R. 761; Price *v.* Kearney etc. Co., 29 Neb. 33, 45 N. W. R. 252.

[4] McCormick *v.* Connolly, 2 Bay (S. C.), 401.

[5] Seymour *v.* Long Dock Co., 5 C. E. Green (N. J.), 397.

the work are omitted, the builder cannot recover for them as extras, as where a contractor claimed for flooring which was not included in the specifications.[1]

§ 52. VALUING EXTRA WORK. Whether compensation for extra work shall be at the same rate as for work done under the contract generally, depends upon the fact as to whether it is of the same character.[2] Some courts have taken this position, that the extras should be valued according to the usual charges for such work, without reference to the contract, from the fact that the obligation to pay for the same arises from a new and independent agreement.[3] But the usual mode, and generally the preferable one, is to estimate the value of the extras according to the prices stated in the original contract, so far as the same can be made to apply.[4] If, however, the original contract has been so deviated from that it cannot be traced or connected with the extra work, the contractor is entitled to its reasonable value.[5]

§ 53. EXTRAS ORDERED NOT A WAIVER OF ORIGINAL CONTRACT. Independently of the stipulation usually found in building contracts, that alterations and additions shall not vitiate the contract, the courts hold that extras done by the builder at the request of the other party do not amount to an abandonment of the contract;[6] nor will additions or alterations of any descrip-

[1] Williams *v.* Fitzmaurice, 3 H. & N. 844.

[2] Chicago & Great Eastern R. R. *v.* Vosburgh, 45 Ill. 311.

[3] McCormick *v.* Connolly, 2 Bay (S. C.), 401.

[4] De Boom *v.* Priestly, 1 Cal. 206; Jones *v.* Woodbury, 11 B. Mon. (Ky.) 167; Clark *v.* The Mayor etc., 4 Comst. (N. Y.) 338; Lovelock *v.* King, 1 Moody & R. 60; Robson *v.* Godfrey, Holt, 236, 1 Stark. 275.

[5] McKinney *v.* Springer, 3 Ind. 59; Pepper *v.* Burland, Peake, 139; Ellis *v.* Hamlen, 3 Taunt. 52.

[6] Smith & Nelson *v.* Bristol, 33 Iowa, 24.

tion. The original contract will still exist, and be binding as far as it can be followed.[1]

It will, however, be generally advisable to see that there is a condition in the contract regulating this subject, and particularly that no extras whatever shall be incurred unless consented to by the owner in writing.[2]

[1] McKinney *v.* Springer, 3 Ind. 59; Ranger *v.* Great W. Ry., 5 H. L. Cas. 72.

[2] It may be well to remark that it is an easy matter to draw a contract so that the party ordering the building escapes liability for extras occasioned during the progress of the work. Such iron-clad agreements, however, frequently operate as a source of ruin to conscientious builders, who, although suffering from losses consequent upon rise in price of materials and labor, honestly carry out all the stipulations of the contract, even if its faithful execution involves extras for which they have no chance of payment. It too frequently occurs that builders attempt large contracts with too little capital, and thereby become hard pressed for more cash to go through with their undertakings. In such extremities they borrow money upon the credit of buildings, if they have any share in the ownership of them, or secure advances from the capitalist employing them. It is by no means a rare occurrence that from a single error in the original estimate the builder finds himself completely swamped upon completion of his agreement, particularly if he has bound himself to do the work for a fixed price, and has left no loophole for escape by way of extras in the contract.

CHAPTER VIII.

SPECIFICATIONS, BILLS OF QUANTITIES, AND TENDERS.

§ 54. SPECIFICATION. The specification is the written statement containing a minute description of the particulars of the work to be executed, and is generally made with reference to the drawings and the building contract. When an architect is employed in preparing the design and plans, it is usual for him to make out the specifications. The preparation of the details of building operations requires a thorough knowledge of the art, a practical idea of quantities and qualities of the materials to be used, and a careful study of the plans of the work to be executed. The builder is bound to scrupulously follow the specifications, and cannot justify a departure therefrom by substituting other details, although as good as those called for; he must execute the work almost to the very letter of his instructions. He is just as firmly bound by the terms of the specifications as by the covenants of the contract.[1] So, where specifications are attached to a building contract at the time of signing, it is merged into the contract, and becomes part of it,[2] and even the architect cannot change

[1] Coey *v.* Lehman, 79 Ill. 173; Braggs *v.* Geddes, 93 Ill. 39. Where a contract-instrument specified that work should be done in 25 rooms and the specifications provided for it in all the rooms, the contract-instrument was held to govern. Tischler *v.* Apple (Fla.), 11 So. R. 273.

Where the specifications are expressly made a part of the contract, a guaranty contained in them binds the contractor. Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. R. 663.

[2] Ibid., and Smith *v.* Flanders, 129 Mass. 322, Dec. 176. Actual annexation of specification to the contract is not necessary, however. Cook *v.* Al-

the terms thereof without special authority.[1] Where more than one copy of the specifications exists, the contractor is bound only by the one shown to him.[2] Where specifications were not read by a contractor, but imperfectly explained to him, he was held to be bound only by the terms as thus communicated.[3] Where no plans or specifications are referred to in the contract, the nature of the building to be erected depends upon the understanding of the parties as shown by the circumstances.[4] Where a contract to build was to be carried out according to directions of an engineer *and* according to certain specifications, the latter were held to be paramount.[5]

We have already seen[6] that the English rule that, when details necessary to complete the work are not mentioned in the contract or specifications, no recovery can be had for them as extras,[7] is not uniformly upheld in this country, for on the contrary it has been judicially declared that compensation will be allowed in all cases for extra work where the latter is necessary to the prosecution of the undertaking.[8] I am constrained to say that the former doctrine has stronger

len *et al.*, 67 N. Y. 578; New England Iron Co. *v.* Gilbert Elevated R. R. Co., 91 N. Y. 153. The specifications need not be signed if they are otherwise sufficiently identified. White *v.* McLaren, 151 Mass. 553, 24 N. E. R. 911.

For the doctrine that all prior agreements in respect to changes of specifications are regarded as merged in the contract as signed, see Coey *v.* Lehmann, 79 Ill. 173; McCormick *v.* Wilson, 39 Minn. 467; Taylor *v.* Fox, 16 Mo. App. 527; Stuart *v.* Cambridge, 125 Mass. 102; Stees *v.* Leonard, 20 Minn. 494.

[1] Adlard *v.* Muldoon, 45 Ill. 193.

[2] Sexton *v.* Chicago, 107 Ill. 323.

[3] Martine *v.* Nelson, 51 Ill. 422.

[4] Doane College *v.* Lanham, 26 Neb. 421, 42 N. W. R. 405.

[5] Burke *v.* City, 34 Mo. App. 570.

[6] *Ante*, § 49.

[7] Williams *v.* Fitzmaurice, 3 H. & N. 844.

[8] Seymour *v.* Long Dock Co. 5 C. E. Green (N. J.), 397.

reasons to support it. When a builder undertakes a contract to erect a house, he agrees either expressly or impliedly, to furnish everything necessary for its completion; and if he fails to allow for certain details, or commits errors in preparing his estimates, it seems but reasonable that the loss should fall upon him and not his employer. Nor does it alter the case that insufficient plans were shown to the builder when the job was tendered to him, for there was not an implied warranty that the specifications were sufficient by the party for whom the plans were prepared.[1] He has generally a fair opportunity to examine them before he makes his tender; and as the law presumes that he is competent to fulfil that which he undertakes,[2] he will not be excused because of the omission of necessary details in the specifications.[3] So, where a party contracted to take down an old bridge and build a new one upon plans and specifications "believed to be correct," but it turned out that extra work was required to complete the job, the court held that the contractor was not entitled to extra compensation, although he claimed that the defendants warranted the work to be possible under the specifications.[4]

The authorities cited in this section are ample to establish, almost beyond dispute, that the fact that a person has asked a builder to estimate work to be done

[1] Sharpe *v.* San Paulo Ry., L. R. 8 Ch. Ap. 597; Scrivener *v.* Pask, 18 C. B. N. S. 785, L. R. 1 C. P. 715.

[2] Waul *v.* Hardie, 17 Tex. 553; Hilyard *v.* Crabtree, 11 Tex. 268; Sherman *v.* Bates, 15 Neb. 18; Smith & Nelson *v.* Bristol, 33 Iowa, 24.

[3] Thorn *v.* Mayor of London, L. R. 9 Ex. 163, 10 Ex. 112, 1 App. Cas. 120; Sharpe *v.* San Paulo Ry., L. R. 8 Ch. Ap. 597.

[4] Thorn *v.* Mayor, L. R. 9 Ex. 163, 1 App. Cas. 120. In the preceding chapter on Extras I have shown that, under certain circumstances, there arises an implied authority for extra work, etc., and reference should be made to that chapter.

according to specifications presented to him is not an implied warranty of the specifications being sufficient,[1] so that the builder's claim of recovery should not be based upon a breach of warranty, but upon a *quantum meruit* upon a new and implied contract.

Where there is obscurity in the drawings and specifications, the contractor must apply to the architect for directions, or he undertakes the work at his own peril.[2]

Where, however, the work has been performed in full compliance with the specifications, no responsibility will attach to the builder if the structure erected falls, or is practically worthless, owing to defectiveness and insufficiency of the plans and specifications.[3] It is the builder's duty faithfully to execute the work for which he has been engaged, and he is not responsible if the undertaking is valueless.[4] Nor is he liable for defects in a building caused by defectiveness in the plans furnished him by the owner, when the defectiveness was of such a nature that it could not have been foreseen by him.[5] So far as the plans are adopted by the owner of the property, they become his, and he is responsible for claims accruing to the contractor or to others for defects in the plans. He may thus become responsible for the fall of buildings owing to defective plans.[6]

[1] Especially if the owner gives notice, where, *e. g.*, contractors are furnishing bids upon plans, that the annexed estimates of quantities of material are not to be relied upon; this will free him from responsibility for error. St. Paul etc. R. Co. *v.* Bradbury, 42 Minn. 222, 44 N W. R. 1. Cf. Sullivan *v.* President etc. of Sing Sing, 121 N. Y. 389, 25 N. E. R. 366.

[2] Clark *v.* Pope, 70 Ill. 128.

[3] Clark *v.* Pope, 70 Ill. 128.

[4] Graves *v.* Caruthers, Meigs (Tenn.), 58, 65.

[5] Loundsberry *v.* Eastwick, 3 Phila. 371; Wade *v.* Haycock, 25 Pa. 382.

[6] Bentley *v.* State, 73 Wis. 416, 41 N. W. R. 338. A contractor's guar-

Alterations rendered necessary by defective plans are at the owner's cost.[1]

Where the contractor deviates from the specifications without the authority required to be given by the contract, we have already seen that he cannot recover even upon a *quantum meruit*.[2] So where the contract was to do certain work according to a specification, and under the architect's directions, and the builder was to allow for the old structure, he must deduct its value from the amount of his claim, unless he can show in evidence that he informed the owner of the land that his estimate did not include the value of the same.[3]

Neither the builder nor the architect can change the specification or deviate substantially therefrom, even by substituting what is claimed to be better work or material, without authority in accordance with the contract.[4]

§ 55. BILLS OF QUANTITIES. It frequently is found advisable, before large building contracts are submitted to competitive builders for tenders (*i. e.* bids), that a schedule of the materials to be furnished, and of the work to be performed, is prepared for their inspection. This itemized list is called a "bill of quantities." Several copies of it are usually prepared, and submitted to those contractors who enter into the competition. The assigning of prices for the various items mentioned is called "taking out quantities." As with the specifica-

anty against liability for his negligence does not secure the owner against this liability for the results of defective plans. MacRitchie *v.* Lake View, 30 Ill. App. 393.

[1] Erskine *v.* Johnson, 23 Neb. 261, 36 N. W. R. 510.

[2] *Ante*, § 27; note 2, p. 92; *post*, p. 99, and also Ellis *v.* Hamlen, 3 Taunt. 52.

[3] Harvey *v.* Lawrence, 15 L. T. N. S. 571.

[4] Adlard *v.* Muldoon, 45 Ill. 193, Dec. 21. See § 12, *ante*.

tion, the bill of quantities may become part of the contract, either by actual annexation thereto, or by undertaking the work in strict conformity with it.[1] It is not considered safe or wise to undertake the erection of a building simply upon a bill of quantities, though this is sometimes done, as numerous contingencies are likely to arise which it will not cover, and which the law cannot always equitably adjust.[2] For instance, if the amount of materials found to be actually needed to complete the structure is in excess of that called for in the bill, the addition may be charged as extra, and the owner of the building cannot tell beforehand what it is going to cost him. It is well, however, to let it be auxiliary to the contract, especially if it is attached as a schedule of prices for extras which are likely to be needed.

In the absence of a stipulation to the contrary, it may be shown that the architect has an implied authority, as agent of his employer, to engage a quantity surveyor,[3] but this is dependent upon proof of the custom of the building trade.[4] If, however, an architect is employed to prepare plans and specifications for a house, and to procure a builder to erect it, he may take out the quantities, and represent to the builder that they are correct, and the latter may thereupon make a tender, which, if accepted and acted upon, will bind the contracting parties. The builder cannot, in such a case, recover more than the contract price, although it turns out that the quantities are erroneous, and that he has expended upon the building a much

[1] Kemp *v.* Rose, 1 Giff. 258.

[2] Ibid.

[3] Moon *v.* Guardian of Witney Union, 3 Bing. N. C. 814.

[4] Taylor *v.* Hall, 4 Ir. R. C. L. 467 ; Wigglesworth *v.* Dallison, Dougl. 201, 1 Sm. L. C. (7th ed.) 606.

larger amount than he contemplated.[1] When he undertook the job he impliedly agreed to furnish everything reasonably necessary for the completion of the building.[2] So, where a contractor had put into a building certain joist not called for in the specification or bill of quantities, and contended that the defendant had the use thereof, the court held that the owner was not liable for the value.[3]

The person for whom the building is to be erected is generally liable for the cost of taking out quantities;[4] but if the offer is accepted by a builder, and afterwards by his act the contract is prevented from being completely executed, he will be liable to the surveyor for his fees in taking out quantities.[5]

The act of submitting a bill of quantities, which has been prepared for the employer by the architect, does not render the former liable upon an implied warranty of their sufficiency,[6] unless he can show that the architect was acting as the employer's agent.[7]

Contracts usually refer only to the plans and specifications, wholly ignoring the bill of quantities; and from the fact that the builder is presumed to understand his business, and to know, independently of estimates made by the architect, what quantities will be necessary to execute the work,[8] he undertakes the work at his own risk.

§ 56. TENDERS. The word "tender" is generally used to mean an offer, either of money or services, in

[1] Scrivener *v.* Pask, L. R. 1 C. P. 715, 18 C. B. N. S. 785.
[2] Williams *v.* Fitzmaurice, 3 H. & N. 844.
[3] Per C. J. Mansfield, Ellis *v.* Hamlen, 3 Taunt. 52.
[4] Moon *v.* Guardians of Witney Union, 3 Bing. N. C. 814.
[5] McConnell *v.* Kilgallen, L. R. Ir. 2 C. L. 119.
[6] Stevenson *v.* Watson, L. R. 4 C. P. D. 148, 48 L. J. C. D. P. 318.
[7] Kemp *v.* Rose, 1 Giff. 258.
[8] Williams *v.* Fitzmaurice, 3 H. & N. 844.

order to save the party offering from the penalty of non-payment or non-performance, but as applied to building contracts it is nearly synonymous to "offer" or "proposal." After the specification or bill of quantities has been prepared, and submitted to a builder or builders, the owner receives a "tender," or estimate of what the work can be done for. A tender, therefore, as applied to building operations, is a formal offer to undertake the erection, alterations, or repairs of a structure for a price named, either directly or indirectly referring to some announcement or proposition requesting such an offer.[1]

Where the act giving authority requires the contract to be let to the lowest bidder after due advertisement, a contract not so entered into cannot be enforced.[2] Combinations by contractors to stifle competition in bids have been held to be against public policy.[3]

Tenders usually contain a stipulation that, if accepted, the fulfilment of the contract can be compelled. But until acceptance a tender may usually be withdrawn by the party making it. When accepted, the acceptance implies precisely the same terms as the tender without variation. A tender becomes a contract only when it is accepted by the party who re-

[1] See Watts, Ex'r v. Sheppard, 2 Ala. N. S. 425.

[2] Littler v. Jayne, 124 Ill. 123. For the latitude of interpretation to be given to the word "responsible," where work is required to be given to the lowest responsible bidder, see Com'rs v. Mitchell, 82 Pa. 343; Hoole v. Kinkead, 16 Nev. 217; People v. Dorsheimer, 55 How. Pr. R. 118; Ross v. Board, 42 Ohio St. 374. As to how far the quality or type of materials may be considered under such a clause, see State v. Betts, 4 Ohio C. C. 86; Weed v. Barch, 56 N. Y. Pract. R. 470.

[3] People v. Lord, 6 Hun, 390; People v. Stephens, 71 N. Y. 527. See § 8 for a case in which competing architects made an agreement to divide the compensation.

quested it,[1] and any deviation from it invalidates the offer, unless agreed to by the parties.[2]

If the tender is accepted in writing, which also stipulates that a subsequent contract shall be entered into, this conditional acceptance is binding as far as it goes, and neither can be withdrawn.[3] Thus, where a builder discovered that he had made a mistake, and withdrew his tender after acceptance, the court held that he was liable to the owner to the extent of the excess over his bid of the amount the owner was compelled to pay other builders to do the work.[4] Had false representations been made to him as to the character of the work to be done, and had he immediately notified the owner of his intention to withdraw his tender or bid, he would not have been responsible for failure to comply with his original offer.[5]

Where a tender is dependent upon a formal contract to be subsequently signed, a question of construction is raised as to whether parties intended that the mere acceptance of the tender should constitute a part of the contract, or that a new agreement should stipulate the terms and conditions binding them.[6] So, where an advertisement announces that the construction of a certain building is open for bids, the advertiser is not bound to give the contract to the lowest bidder when a new agreement is contemplated by the

[1] Tucker *v.* Woods, 12 Johns. (N. Y.) 190; Tuttle *v.* Love, 7 Johns. 470.

[2] Tuttle *v.* Love, 7 Johns. (N. Y.) 470. See, also, 4 Wheat. 225, 3 Johns. 534, 6 Wend. (N. Y.) 103, 1 Pick. (Mass.) 278; Howard *v.* Ind. School, 78 Me. 230.

[3] Crossley *v.* Maycock, L. R. 18 Eq. 180.

[4] Lewis *v.* Brass, L. R. 3 Q. B. D. 667.

[5] Martine *v.* Nelson, 51 Ill. 422.

[6] See language of Master of Rolls Jessel in Winn *v.* Bull, L. R. 7 Ch. Div. 29. *Contra*, Eadie *v.* Addison, 52 L. J. Ch. 80, 47 L. T. 543.

publication.[1] The doctrine just stated is, however, disputed, and it is recommended that the usual practice of reserving the right of rejecting any or all tenders be followed, and a notice given in all advertisements calling for bids. When an offer to furnish materials or supply goods is accepted, the party making the tender is bound to comply upon any order therefor being given.[2]

§ 57. Auction Sales. Very similar to the offering and acceptance of tenders is the contract of sale made at auction. In the latter case every bid of any one present is an offer by him to pay the amount of the bid. The auctioneer is the agent of both parties.[3] The bid may be withdrawn any time before acceptance, but upon the fall of the hammer it becomes a binding contract. An advertisement that a sale at auction will take place on a certain day does not amount to a warranty that the sale will take place.[4] But the advertisement of a sale without reserve does create a binding contract between the auctioneer and the highest bidder that the goods will be knocked down to him.[5] If a party advertises a sale knowing that it is not within his power to carry it out, he may become liable upon an action for fraudulent representation at the instance of the party who incurs expense in inspecting and valuing the property.[6]

[1] Spencer *v.* Harding, L. R. 5 C. P. 561, 39 L. J. C. P. 332; Thatcher *v.* England, 3 C. B. 254; Mainprice *v.* Wesley, 6 B. & S. 420.

[2] Great Northern Ry. Co. *v.* Witham, L. R. 9 C. P. 16.

[3] Anson on Contracts, 332, citing Woolfe *v.* Horne, L. R. 2 Q. B. D. 355.

[4] Harris *v.* Nickerson, L. R. 8 Q. B. 286; Payne *v.* Cave, 3 T. R. 148; Hinde *v.* Whitehouse, 7 East, 568. See Parsons on Contracts, 522 *et seq.*

[5] Warlow *v.* Harrison, 1 E. & E. 295; Thornett *v.* Haines, 15 M. & W. 367.

[6] Emden on Building, 60, citing Richardson *v.* Silvester, L. R. 6 Q. B. 34.

CHAPTER IX.

PENALTIES, FORFEITURES, AND LIQUIDATED DAMAGES.

§ 58. Penalties Generally. The condition in a written contract by which one of the parties agrees to pay a certain sum of money, or incur other obligations, if he shall fail to execute the stipulations of the agreement, is called a penalty. An ancient and peculiar custom required the principal to covenant under seal by a conditional bond acknowledging that he was indebted to the other party in the amount desired as a penalty, and then reciting that upon fulfilling certain conditions he would be released from the alleged indebtedness, and the bond be void and of no effect. But the courts of equity soon took cognizance of the injustice imposed by a strict enforcement of these iniquitous conditions, and laid down the rule that, notwithstanding such stipulations, the amount recoverable should be limited to the loss actually sustained.[1]

The courts of law soon followed those of equity in this matter;[2] so that now, in construing contracts, the courts will not be guided by the amount given, if it can be shown to be of the nature of a penalty.

§ 59. Liquidated Damages Generally. Although parties to a contract have a perfect right to determine beforehand what shall be the damages which shall be paid to the other by the one who violates it, the law does not enforce such agreements when they amount

[1] Kemble *v.* Farren, 6 Bing. 148.

[2] Noyes *v.* Phillips, 60 N. Y. 408; Nowlin *v.* Pyne, 40 Iowa, 166.

to the imposition of penalties or forfeitures. Where the amount stated to be paid for a breach of the contract is evidently what the parties assess as the damage caused thereby, the stipulation will be upheld as liquidated damages;[1] but where the object is to secure its performance by the imposition of an amount in excess of the loss likely to be sustained, it will be considered a penalty and will not be enforced.[2] Liquidated damages are, therefore, those which have been determined beforehand by original contract. Such an agreement is sanctioned by the law.

§ 60. DISTINCTION. The distinction between liquidated damages and penalties attached to the contract for the breach of it is not easily drawn. The use of the words "penalty" or "liquidated damages" in an agreement will not determine the question, for the law considers the intention of the parties as manifested, not only in the instrument itself, but also by extraneous circumstances.[3] The leading case upon the subject[4] contained a clause that, if either of the parties neglected or refused to fulfil the engagement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, to which sum it was thereby agreed that the damages sus-

[1] 2 Story Eq. Jur. § 1318; Rielly *v.* Jones, 1 Bing. 302; Tingley *v.* Cutler, 7 Conn. 291; Chamberlain *v.* Bagley, 11 N. H. 234; Gammon *v.* Howe, 14 Me. 250; Watts, Ex'r *v.* Sheppard, 2 Ala. N. S. 425; Bridges *v.* Hyatt, 2 Abb. Pr. 449.

[2] Kemble *v.* Farren, 6 Bing. 141; Grocers' Co. *v.* Donne, 3 Scott, 364; Bagley *v.* Peddie, 5 Sandf. (N. Y.) 192; Merrill *v.* Merrill, 15 Mass. 488.

[3] 2 Story Eq. Jur. § 1318; Perkins *v.* Lyman, 11 Mass. 76; Graham *v.* Bickman, 4 Dall. 149; Wallis *v.* Smith, L. R. 21 Ch. D. 223; Astley *v.* Weldon, 2 Bos. & P. 335, 350; Lowe *v.* Beers, 4 Burr. 2228. Whether a provision is to be regarded as a penalty or as liquidated damages depends upon the circumstances of the contract and not upon the words used. Ward *v.* Hudson etc. Co., 125 N. Y. 230, 26 N. E. R. 256.

[4] Kemble *v.* Farren, 6 Bing. 141.

tained by such refusal or neglect should amount, and which sum was thereby declared to be liquidated and ascertained damages and not a penalty, or in the nature thereof. Yet, notwithstanding this direct expression, the court held that the sum was a penalty and could not be recovered.[1] The following rules are generally conceded: —

Where the sum fixed as liquidated damages is manifestly above the injury sustained, it will be held to be a penalty, and only actual damage can be recovered for.[2]

Where the contract is for a matter of uncertain value, and a sum is fixed to be paid on the breach of it, the sum is recoverable as liquidated damages.[3]

Where the payment of the money appears to have been intended only to secure the performance of the contract, it will be construed as a penalty.[4]

Where the contract contains a number of conditions, and the penalty is applied to only one of them, it is not recoverable as liquidated damages.[5]

§ 61. Forfeitures Generally. Where there is a stipulation in the contract, that for certain breaches the party shall lose his rights under the contract or forfeit a fixed sum, this condition is called a forfeiture. As will readily be seen, a forfeiture is very similar in its nature to a penalty. The distinction cannot be clearly drawn in all cases, and generally the same rules

[1] See, also, Beale *v.* Hayes, 5 Sandf. (N. Y.) 640; Curry *v.* Larer, 7 Pa. St. 470; Moore *v.* Platte Co., 8 Mo. 467; Heard *v.* Bowers, 23 Pick. 455; Niver *v.* Rossman, 18 Barb. 50; Dakin etc. *v.* Williams etc., 17 Wend. 447, 455. But see Brewster *v.* Edgerly, 13 N. H. 275, 278.

[2] Magee *v.* Lavell, L. R. 9 C. P. 115; Scofield *v.* Tompkins, 95 Ill. 190; Lea *v.* Whitaker, L. R. 8 C. P. 70.

[3] Kemble *v.* Farren, 6 Bing. 147.

[4] Merrill *v.* Merrill, 15 Mass. 488; Slowman *v.* Walter, 1 Bro. Ch. 418.

[5] Kemble *v.* Farren, 6 Bing. 147; Bagley *v.* Peddie, 5 Sandf. (N. Y.) 192.

apply to both.[1] A forfeiture implies a penalty, and not liquidated damages.[2]

§ 62. The Foregoing Rules as Applied to Building Contracts. We have considered it advisable to dwell somewhat generally upon the rules of law governing penalties, forfeitures, and liquidated damages, for the reason that it is quite common to insert penal clauses in building contracts, and it is necessary to explain the common principles of law in order to point out the distinction between assessing a sum to be paid as liquidated damages, in the event of a non-performance of a building contract, and a penalty to compel performance.

§ 63. Instances and Effect of Penalties. Where a building contract specified that $20 should be paid for every day's delay in completing a house, the court held the stipulation to be a penalty, and said that only nominal damages could be recovered in the absence of proof that the owner was injured by the delay.[3]

So, where the agreement was to complete the building by a certain day, in default of which to pay £10 per week for every week delayed, and there was among other stipulations a condition that, if all things agreed upon were not faithfully executed, the builders should pay £1,000 as liquidated damages, it was held that the latter was a penalty, and the owner could recover only the actual damage sustained.[4]

[1] Salters *v.* Ralph, 15 Abb. Pr. 278; Hunter *v.* Hunter, 17 Barb. 26.

[2] Ibid.

[3] Wilcus *v.* Kling, 87 Ill. 107. But see Hahn *v.* Horstman, 12 Bush (Ky.), 249. If the main object of the payment of the money, upon breach of a condition, is to secure performance, it will be construed as a penalty. See Slowman *v.* Walter, 1 Bro. Ch. 418; Graham *v.* Bickham, 4 Dall. 149; Merrill *v.* Merrill, 15 Mass. 488.

[4] *In re* Newman, *Ex parte* Capper, L. R. 4 Ch. D. 724, 46 L. J. B. 59. In the following cases the stipulations were held upon the circumstances to be penalties: Condon *v.* Kemper, 47 Kan. 126, 27 Pac. R. 829 (erect-

§ 64. Instances of Liquidated Damages. Where the contract stipulates that the building shall be completed by a certain day, and that in case of failure the builder shall pay a fixed sum for each day or week the completion is delayed, and the actual damage to the owner is uncertain, the amount or amounts stipulated to be paid will be considered as liquidated damages.[1]

So, where a clause in an agreement to repair certain buildings for $1,500, complete for occupancy by December 1, provided that, for each and every day's delay in the completion after that date, the builder should forfeit $5, this condition was construed as fixing the amount of liquidated damages and not as a penalty.[2] Again, where a building contract contained a stipulation that the building should be finished within two months, and also provided that if completed before that time the builder should be paid for the time anticipated at a specified rate, and that, if the building should not be finished by the time, the contractor should allow for the time extended at the same rate, it was held that the latter clause controlled the former, and by necessary implication allowed a reasonable time beyond the two months for the finishing of the building upon

ing a party wall and moving a building); Clement *v.* Schuylkill etc. Co., 132 Pa. 445, 19 Atl. R. 274 (raising a house); Brennan *v.* Clark (Neb.), 45 N. W. R. 472 (building a house); Eva *v.* McMahon, 77 Cal. 467, 19 Pac. R. 872 (under Civ. Code Cal. §§ 1670–71). Cf. Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. R. 890, decided under Civ. Code Cal. § 1671.

[1] Wallis *v.* Smith, L. R. 21 Ch. D. 243, 52 L. J. Ch. 145, 47 L. T. 389; Crux *v.* Aldred, 14 W. R. 656.

[2] Hall *v.* Crowley, 5 Allen, 304. See Wallis *v.* Smith, L. R. 21 Ch. D. 243, where there were several special stipulations, and the sum of £5,000 was to be paid upon failure and was held to be liquidated damages; 47 L. T. 389, 31 W. R. 214. But see, *contra*, *In re* Newman, *Ex parte* Capper, L. R. 4 Ch. D. 724.

paying or allowing the fixed rate as liquidated damages.[1]

Where liquidated damages are allowed for delay, no higher damages can be claimed for the same cause.[2] A contractor is not relieved by unavoidable accident from a stipulation for liquidated damages.[3]

§ 65. INSTANCES AND EFFECT OF FORFEITURES. Where a contract specified that a certain percentage of each instalment of pay to a contractor for building a railroad was to be retained until a certain amount accrued, and this gross sum was to be forfeited as liquidated damages should the contractor fail to complete the road in time, the condition was held to be a penalty, notwithstanding the explicit contrary allegation.[4] If a clause of forfeiture be inserted under a mistake as to the amount and difficulty of the work to be performed, it is void, and will not prevent the builder from obtaining the benefit of the other stipulations in the contract.[5] It seems, however, that where the time of performance is made material, a failure to perform at the time agreed upon may forfeit the contract.[6]

If the agreement provides that the benefits of the

[1] Folsom *v.* McDonough, 6 Cush. 208. See Legge *v.* Harlock, 12 Q. B. 1015, 18 L. J. Q. B. 45.

In the following cases the stipulations were held, upon the circumstances, to be for liquidated damages: Lincoln *v.* L. R. Granite Co. (Ark.), 19 S. W. R. 1056 (building a foundation); De Graff *v.* Wickham (Iowa), 52 N. W. R. 503 (erecting a building); Malone *v.* Philadelphia, 147 Pa. 416, 23 Atl. R. 628 (building a bridge for a city).

[2] Welch *v.* McDonald, 85 Va. 500, 8 S. E. R. 711.

[3] Ward *v.* Hudson etc. Co., 125 N. Y. 230, 26 N. E. R. 256. *Contra*, Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. R. 557.

[4] Dullaghan *v.* Fitch, 42 Wis. 679; especially where it was provided that the parts of the work were to be completed at divers times. Savannah etc. R. R. Co. *v.* Callahan, 55 Ga. 33; Lyman *v.* Babcock, 40 Wis. 503.

[5] Verzan *v.* McGregor, 23 Cal. 339.

[6] Kemp *v.* Humphrey, 13 Ill. 573.

contract shall be forfeited, and the materials used in the unfinished structure become absolutely the property of the owner of the land, upon breach of performance by the builder within the time prescribed, the enforcement thereof can, in any event, be made only before the time fixed for completion has elapsed;[1] for if the builder has been led to believe by the conduct of the employer that the time condition will be waived, he will not forfeit that which he has done.[2]

Forfeitures are not favored either in equity or in law, and, when such an enforcement will work a hardship upon the defendant, the courts will consider all circumstances tending to show a waiver of the forfeiture.[3] So where the land-owner, after the date of forfeiture, continued dealing with the builder upon the terms of the contract, the court held that it amounted to a waiver of the forfeiture clause.[4] The builder will be compensated in damages if the land-owner wrongfully takes possession of the building. Specific performance cannot be compelled in such cases, nor injunction granted;[5] but if the builder refuses to complete the work, and prevents the owner from doing the same, an injunction may in certain cases be allowed against him.[6]

§ 66. ENFORCEMENT. The party who has suffered from the breach of a contract containing a penal clause may bring an action of debt either for the penalty, or upon the contract, and recover damages exceeding the

[1] Walker *v.* London & North Western Ry. Co., L. R. 1 C. P. D. 518, 45 L. J. C. P. D. 787.

[2] Marsden *v.* Sambell, 28 W. R. 952.

[3] *Contra*, Kensington *v.* Brindley, 12 Moo. C. P. 87. But see *Ex parte* Newitt, L. R. 16 Ch. D. 522, 531.

[4] See, also, Arterial Drainage Co. *v.* Rathangan etc., 6 L. R. (Ir.) 515.

[5] Garrett *v.* Banstead etc. Ry., 4 De G., J. & S. 462.

[6] Corporation *v.* Rooney, 7 L. R. (Ir.) 191.

amount of the penalty, if he can prove that he has sustained the same,[1] not, however, if he has received the amount of the penalty.[2] A penalty or forfeiture cannot be recovered for delay of the builder caused by the owner of the building.[3]

Where the contract stipulates that the builder shall be liable for certain sums every stated period upon certain contingencies, such sums may be deducted from the amount due on the completion of the work from the contract price,[4] or set off in an action for extras brought by the owner,[5] or suit may be instituted to recover the loss sustained. If the contract stipulates that a certain sum or sums shall be deducted from the price, the same may always be available as a set-off.[6]

§ 67. NOTICE. Sometimes building contracts specify that notice shall be given in writing to the contractor, when the employer is dissatisfied with the work, whether as to its progress or as to the quality of the materials furnished, and that, if after notice the contractor fails to comply, the employer can take possession of and complete the work. Any plain statement conveying the intention of the party to claim the benefit of the provision will be generally held to be sufficient,[7] as for instance: "I give notice to you to supply all proper and sufficient materials and labor for the due prosecution of the works, and with due expedition to proceed therewith; and further, if you shall, for seven

[1] See opinion of Mansfield, C. J., in Lowe *v.* Beers, 4 Burr. 2228; Harrison *v.* Wright, 13 East, 343.

[2] Bird *v.* Randall, 3 Burr. 1352, 1 W. Bl. 387.

[3] *Ante*, §§ 37–42, and Russel *v.* Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. 68, 7 L. T. N. S. 804.

[4] Duckworth *v.* Allison, 1 M. &. W. 412.

[5] See, also, Marshall *v.* Hann, 2 Harr. (N. J.) 425.

[6] Jones *v.* St. John's Col., L. R. 6 Q. B. 115, 40 L. J. Q. B. 80.

[7] A form of notice will be found in the Appendix.

days (or other time named in the contract) after this notice, fail to comply therewith, I shall, as engineer, and on behalf of the corporation, take the works wholly out of your hands."[1]

§ 68. MEASURE OF DAMAGES.[2] (*a*) *The Contractor as Plaintiff.* Here the general rule, where the owner refuses to allow the building to begin, is that the contractor shall recover the difference between the contract price and the cost to the contractor of the work.[3] Where the owner refuses to allow the building to proceed, the contractor should recover the cost up to date, plus whatever margin of profit would have remained between the probable final cost and the contract price.[4] The contractor may recover for increased

[1] Pauling *v.* Dover, etc., 10 Ex. Ch. 753, 24 L. J. Ex. 128.

[2] On this point see, also, §§ 27, 41, *ante.*

[3] Singleton *v.* Wilson, 85 Tenn. 344, 2 S. W. R. 801; Richter *v.* Meyer (Ind. App.), 31 N. E. R. 582; Scheible *v.* Klein, 89 Mich. 376, 50 N. W. R. 857; Watson *v.* Gray's Harbor Brick Co., 3 Wash. St. 283, 28 Pac. R. 527.

[4] In Insley *v.* Shepard, 31 Fed. R. 869, the elements of this cost to date were said not to include expense sustained in adapting material previously purchased for use in other works, in the construction of patterns, or in obtaining the contract; moreover, the general cost must be diminished by an allowance for time set free and for the remission of risk and anxiety, this sum to be reckoned at 30 per cent. of the theoretical profits. In McMaster *v.* State, 108 N. Y. 542, 15 N. E. R. 417, where a contract to furnish sandstone for a public building was in question and the contract was one requiring years to complete, the expenses of capital and machinery, together with the contingencies of the case, were held proper to be considered. In Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 S. W. R. 18, this cost was held to include the value of tools and plant in use at the time of cessation of work (so far as not covered by instalments paid), and the value of material on hand or ready subsequent to the last estimate. In Hammond *v.* Beeson (Mo.), 15 S. W. R. 1000, the contractor was allowed the expense of teams and men kept in readiness for the work. In O'Connell *v.* Hotel Co., 90 Cal. 515, 27 Pac. R. 373, the contractor (for iron-work) was allowed to recover for patterns prepared and useless for other purposes. In Danforth *v.* R. Co., 93 Ala. 614, 11 So. R. 60, the contractor was allowed to show the difference between the specified contract schedules of

cost of construction caused by delay of the owners in performing their part of the agreement, or by delay on his part due to their action;[1] or by failure of the owners to perform some part of their contract.[2] The cost of procuring materials in another market than that where the property is situated may be charged by the contractor in a suit against the owner for failing to furnish material as agreed, if it was proper to seek the other market.[3]

(*b*) *The Owner as Plaintiff.* Where the breach by the contractor consists in defective performance, or in failing to repair as agreed, the owner's damages will include the cost of alterations by the owner necessary to put the property in the condition contracted for.[4] Where

prices and the actual cost to himself. See Hale *v.* Hess, 30 Neb. 42, 46 N. W. R. 261. In Davis *v.* Bronson, 50 N. W. R. 836 (N. D.), the contractor was not allowed to recover the full contract price, because he had been notified before beginning not to go on.

[1] Louisville etc. R. Co. *v.* Hollerbach, 105 Ind. 137; Bitting *v.* U. S., 25 Ct. Claims, 502 (where the price of labor was raised in the interval by a strike).

[2] Nason M'f'g Co. *v.* Stephens, 127 N. Y. 602, 28 N. E. R. 411.

[3] Vickery *v.* McCormack, 117 Ind. 594, 20 N. E. R. 495.

Profits which might have been made upon another job during delay cannot be recovered. O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. R. 168. For cases determining the apportionment of damages in suits by architects who have merely prepared plans, all further services having been stopped by the owner, see Marquis *v.* Lauretson, 76 Iowa, 23, 40 N. W. R. 73; Noyes *v.* Pugin, 2 Wash. St. 653, 27 Pac. R. 548.

[4] S. & B. M'f'g Co. *v.* Phelps, 130 U. S. 520, 9 Sup. Ct. R. 601; Leathers *v.* Sweeney, 41 La. Ann. 287, 5 So. R. 662. Where the owner had the work completed by another contractor on plans requiring less material, after obtaining and rejecting a bid on the original plan, he was allowed to recover the difference between the contract price and the actual cost, not the difference between the contract price and the bid on the original plans. Deeves *v.* Richardson, 14 N. Y. Suppl. 633. Where the contract is to remove a building, the owner may recover upon its breach only the reasonable cost of removal, if the contractor had been paid, and not the profits lost through non-removal. Sherman etc. Co. *v.* Leonard (Kans.), 26 Pac. R. 717.

the breach by the contractor consists in failing to complete at the time appointed, the measure of damages is the reasonable rental value during the delay, not the actual rental value several months later.[1] Where the breach consists in a failure to erect a building as agreed, the measure is the additional value which would have accrued to the land.[2] The contractor may show in reduction of damages that he has supplied certain of the alleged defects since the action was brought.[3]

Where the contractor fails to begin work, the measure is the difference between the contract price and the price agreed upon in the contract afterwards made with another for the same work. Goldsboro *v.* Moffett, 49 Fed. R. 213.

[1] Scribner *v.* Jacobs, 9 N. Y. Suppl. 856; Brownell *v.* Chapman (Iowa), 51 N. W. R. 249; Hutchinson M'f'g Co. *v.* Pinch, 91 Mich. 156, 51 N. W. R. 930; Karf *v.* Lull, 70 Ill. 420; Ruff *v.* Rinaldo, 55 N. Y. 664. The measure of damages for a breach of a contract to furnish a roof warranted tight for two years is the difference between the value as constructed and the value as contracted for, plus any loss from the non-user of the premises thereby caused. White *v.* McLaren, 151 Mass. 553, 24 N. E. R. 911.

[2] Mobile R. Co. *v.* Gilmer, 85 Ala. 422; Louisville etc. R. Co. *v.* Sumner, 106 Ind. 55; Watterson *v.* Alleghany R. Co., 74 Pa. 208; Houston etc. R. Co. *v.* Molloy, 64 Tex. 607; Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. R. 506.

[3] Rauscher *v.* Cronk, 3 N. Y. Suppl. 470.

CHAPTER X.

SURETIES, REPRESENTATIVES, AND ASSIGNEES.

§ 69. SURETIES. Building contracts are seldom entered into for the construction of public buildings, or extensive works of any character, without security for the faithful performance of the work. The general rules of law relating to suretyship govern the legal status in this as in other contracts. Thus, where a surety guarantees that a builder will execute his contract to the satisfaction of his employer, and the contract is materially altered without his assent, he will be discharged from responsibility[1] whether the change or variation in the contract is prejudicial to him or not.[2] So if the time of performance is increased without his assent.[3] Where, by the contract, the surety guaranteed the performance of the building agreement, which was to be paid for by instalments, and the owner paid the instalments before they were due, it was held that this act discharged the surety;[4] so, also, where the owner failed to insure the property as agreed;[5] so, also, where he made larger advances to

[1] Judah *v.* Zimmerman, 22 Ind. 388; General Steam Nav. Co. *v.* Rolt, 6 C. B. N. S. 550; St. Albans Bank *v.* Dillon, 30 Vt. 122; Watriss *v.* Pierce, 32 N. H. 550.

[2] Per Story, J., 9 Wheat. 680; Commissioners etc. *v.* Ross, 3 Binney (Pa.), 520; Miller *v.* Stewart, 4 Wash. C. C. 26.

[3] Burge Suret. 203; Samuell *v.* Howarth, 3 Mer. Ch. 272; Mayhew *v.* Cricket, 2 Swanst. Ch. 185, 189.

[4] General Steam Nav. Co. *v.* Rolt, 6 C. B. N. S. 550.

[5] Watts *v.* Shuttlewort, 5 H. & N. 235, 29 L. J. Ex. 229.

the builder than contracted for;[1] so, also, where the owner and the builder change the terms of the obligation in any manner without the consent of the surety.[2]

The giving of security may be a condition precedent to the owner's liability to the builder if it is made one

[1] Gordon *v.* Rae, 3 E. & B. 1065, 27 L. J. Q. B. 185.

[2] Miller *v.* Stewart, 4 Wash. C. C. 26. *Conduct discharging completely:* Warden *v.* Ryan, 37 Mo. App. 466 (where the consideration to be paid to the contractor was increased); Simonson *v.* Thori, 36 Minn. 439, 31 N. W. R. 861 (where the owner paid out various sums in excess of the contract stipulation, and without regard to the state of the work); Wier Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. R. 232 (where it was said that even an alteration favorable to the surety discharged him). *Conduct discharging the surety pro tanto:* Brennan *v.* Clark (Neb.), 45 N. W. R. 472 (where the contract stipulated for payments only upon the engineer's estimate and payments were made without it). *Conduct not discharging the surety:* McLennan *v.* Wellington, 48 Kan. 756, 30 Pac. R. 183; Hayden *v.* Cook (Neb.), 52 N. W. R. 165; Moore *v.* Fountain (Miss.), 8 So. R. 509 (where alterations were made, but the contract provided that alterations could be made); Henricus *v.* Englert, 63 Hun, 625, 17 N. Y. Suppl. 235 (where the contractor consented to minor changes without binding himself to perform them); Hayden *v.* Cook (Neb.), 52 N. W. R. 165 (where payments were made before the expiration of the period for filing liens); Abbott *v.* Morrisette, 46 Minn. 10, 48 N. W. R. 416 (where one of two contractors assigned to the other without notice to the surety); Dorsey *v.* McGee, 30 Neb. 657, 46 N. W. R 1018 (where the fronting of the building was altered, the sureties never having seen the original plan); Moore *v.* Fountain (Miss.), 8 S. R. 509 (where the owners paid larger amounts to the contractor than were required); Duluth *v.* Heney, 43 Minn. 155, 45 N. W. R. 7 (where the contractors were paid off in full upon the completion of the contract); Casey *v.* Gunn, 29 Mo. App. 49 (where the owner was allowed by the contract to retain enough to cover claims of lien-men, but paid out to the contractor without doing so); Kingston-upon-Hull *v.* Harding, 1892, 2 Q. B. 494 (where the contractors had been paid, but had fraudulently concealed defective work).

Under statutes requiring a bond from the contractor for the benefit of lien-men, no alteration, extension of time, or other conduct of the owner or other nominal obligee can affect the surety as against the real obligees. Steffes *v.* Lemke, 40 Minn. 27, 41 N. W. R. 302; Conn *v.* State, 125 Ind. 514, 25 N. E. R. 443.

Arbitration: Where the parties have agreed to submit disputes of a certain sort to arbitration, and afterwards other matters are included in the submission, a surety who has not assented to the additional submission is not bound by it. Cooke *v.* Odd Fellows' Fraternal Union, 1 N. Y. Suppl. 498.

of the stipulations in awarding the contract, but this condition may be waived by the builder being requested to proceed with the work without security.[1] No notice, however, of acceptance is necessary where the promise of the surety is absolute and definite in amount; but otherwise acceptance by the promisee is made a condition precedent.[2]

Where "a contractor, having given security for the performance of his contract, ascertained that he could not complete the work, and, upon notice thereof to his surety, an agreement was made between the contractor and his surety with the owner of the building, whereby the latter agreed to pay such bills for materials purchased by the contractor as should be certified by the surety and the architect, upon the promise of the surety to reimburse him, it was held that this contract did not create any joint liability as between the contractor and the owner, and that no joint action upon it could be maintained against them for materials purchased, and that the owner had no authority and was under no obligation to pay any bill for materials not certified to by the surety."[3]

Where there is a penalty named in the contract, the liability of the surety cannot exceed the amount thereof, but in many cases may be less than the penalty.[4] The right of contribution of co-sureties is the same as in other cases, that is, where one of the sure-

[1] Roberts *v.* Brett, 6 C. B. N. S. 635.

[2] Cremer *v.* Higginson etc., 1 Mason C. C. R. 323; Russell *v.* James etc., Ibid. 368; Stafford *v.* Lowe, 16 Johns. (N. Y.) 67.

[3] Kelly *v.* Kellogg *et al.*, 79 Ill. 477.

[4] Tunison *v.* Briggs, 2 South. (N. J.) 498; Wilde *v.* Clarkson, 6 Term, 303; Barney's Ex'r *v.* Bush, 3 Cow. (N. Y.) 151. The surety is liable for the costs of a suit to establish a mechanic's lien, but not for the expenses of selling the property under such lien. La Fayette etc. Ass'n *v.* Kleinhoffer, 40 Mo. App. 388.

ties is compelled to pay the whole debt for which he and one or more others were jointly and severally bound, he may recover from the other sureties not paying his or their share of the debt.[1] The remedy of contribution is recognized in both law and equity, but a suretyship cannot be validly made except in conformity with the statute of frauds.[2]

§ 70. Effect of Death of one of the Parties to a Building Contract. It is a general rule of law that upon a person's death all his personal estate, and all his rights of action which affect his personal estate, pass to his executor or administrator, subject to all the liabilities chargeable to it; while his real estate passes to his heir or devisee. Accordingly those contracts which are not personal, or dependent upon the skill of the deceased, are part of his estate, and his representatives are entitled to the benefit thereof. But where the contract relates to personal service or skill, death dissolves the contract, for representatives can neither be compelled to execute it nor insist upon undertaking to do so.[3] The contract of an architect is notably one of the latter description.[4] On the other hand, it has usually been held that the contract of a builder passes to his representatives, who, being entitled to whatever benefit they can derive from completing it, must also suffer whatever damages may thereby be incurred.[5] Therefore, if a builder contracts to build and complete a house by a certain time,

[1] Fletcher *et al. v.* Jackson *et al.*, 23 Vt. 581, 1 Mood. & M. 406; Layer *v.* Nelson, 1 Vern. 465.

[2] 29 Car. II. ch. 3. See *ante*, § 2.

[3] Baxter *v.* Burfield, 2 Str. 1266; Chamberlain *v.* Williamson, 3 M. & S. 408; Robinson *v.* Davison, L. R. 6 Exch. 269.

[4] *Ante*, § 12.

[5] Siboni *v.* Kirkman, 1 M. & W. 418; Wentworth *v.* Cock, 10 A. & E. 42.

but dies in the interim, his executor or administrator is bound to complete it.[1] In a case where the work was not even begun before the death of the builder, the court held that "if a party contract for himself and his executors to build a house, and die, the executors must go on, or they will be liable for damages for not completing the work; if they go on, they may recover as executors."[2] If, however, the building proposed to be erected is one requiring special skill or taste or knowledge, the contract will be discharged by the death of the builder.[3] There are a few American cases holding that, where a party is prevented from completing his contract by sickness or other reasonable excuse, he can recover upon a *quantum meruit* for what he has done.[4] Thus, where a plaintiff, under contract to superintend certain works for a certain time, was prevented from filling his contract by breaking his limb, it was held that he could recover in proportion to the rate agreed upon for the whole.[5] The latter cases are rather those which uphold contracts for work and service than for entire undertakings.

If the party at whose instance the building was to be erected dies before the contract is performed, his representatives will be bound to pay for the completion of the work if the deceased left sufficient assets, or they must satisfy whatever damages may result to the builder from the breach of the contract.[6]

[1] Quick *v.* Ludburrow, 3 Bulstr. 30; Appeal of McDaniel (Pa.), 12 Atl. R. 154.

[2] Marshall *v.* Broadhurst, 1 C. & J. 403.

[3] Wentworth *v.* Cock, 10 A. & E. 45, and cases there cited.

[4] Fahy *v.* North, 19 Barb. 341.

[5] Hargrave *v.* Conroy, 4 C. E. Greene (N. J.), 281.

[6] Wentworth *v.* Cock, 10 A. & E. 45; Cooper *v.* Jarman, L. R. 3 Eq. 98.

§ 71. Effect of Bankruptcy or Insolvency of Builder. Although there is at present no national bankrupt law in this country, the various States have statutes regulating insolvency proceedings within their own borders. These State enactments have no extra-territorial effect. There is considerable diversity in the most important provisions of bankrupt acts, yet this theory is recognized in all, — that upon failure, *all* the property of the debtor passes into the hands of the assignee, subject only to existing liens.[1] The trustee, receiver, or assignee (whichever he may be called) becomes immediately entitled to the performance of executory contracts and choses in action of the failing debtor. His position corresponds, in many respects, with that of the personal representative of a deceased person, his duty being to do everything in his power for the interest of the creditors; he has, however, generally, a broader power to avoid executory contracts which he may regard as not beneficial to the estate. The contract of a builder, upon insolvency, when not of such a nature as to make it personal, passes to his trustee.[2] Indeed, it has even been held that a clause inserted in a building contract providing that, should the builder fail before completion of the work, the owner of the building could consider the contract as rescinded and go on with the work, was void, as depriving the trustee of his right to complete the contract, and an unjust preference.[3] Such a right, however,

[1] Avery *v.* Hackley, 20 Wall. 407; *Ex parte* Smith (South. D. N. Y.), 1 Bank. Reg. 169; Rogers *v.* Spence, 13 M. & W. 580.

[2] Gibson *v.* Caruthers, 8 M. & W. 321. The claim of an architect for services rendered and damages for wrongful discharge belongs to the trustee. Emden *v.* Carte, 17 Ch. D. 768.

[3] *Ex parte* Barter *v.* Walker, L. R. 26 Ch. D. 510; Whitmore *v.* Gilmour, 12 M. & W. 810.

would not pass to the trustee if the contract required the personal skill of the builder, which the latter refused to give.

It has been held in England that a builder cannot make an assignment of future contingent receipts of his business accruing after the commencement of his bankruptcy.[1] As the trustee of an insolvent generally has the right to renounce such executory contracts as are not advantageous to the creditors' fund,[2] so the trustee of a bankrupt builder may expressly disclaim all unexecuted contracts which he esteems onerous to the estate.[3]

[1] Emden on Building, 191, citing *Ex parte* Nichols, *Re* Jones, L. R. 22 Ch. D. 782, 52 L. J. Ch. 635, 31 W. R. 661. *Contra*, *Ex parte* Moss, *Re* Toward, L. R. 14 Q. B. D. 310.

[2] Anson on Contracts, 224.

[3] Lawrence *v.* Knowles, 5 Bing. N. C. 399; *Ex parte* Chalmers, L. R. 8 Ch. 289, 42 L. J. Q. B. 37.

Assignments apart from Insolvency. An assignment by a firm of contractors will not include money due to an individual member who has completed a building left unfinished by the dissolution of the partnership. Spicer *v.* Snyder, 58 Hun, 605, 12 N. Y. Suppl. 744. For cases in which assignments by contractors of sums due under the contract were recognized, see Bank of Harlem *v.* Bayonne, 48 N. J. Eq. 246, 28 Atl. R. 478; Spicer *v.* Snyder, 58 Hun, 605, 12 N. Y. Suppl. 744; Johnson Co. *v.* Bryson, 27 Mo. App. 341; Kingsbury *v.* Burrill, 151 Mass. 199, 24 N. E. R. 36; Adler *v.* Kansas City R. Co., 92 Mo. 242, 4 S. W. R. 917; Campbell *v.* Hildebrandt, 68 Tex. 22, 3 S. W. R. 243; Segee *v.* Downes, 143 Mass. 240, 9 N. E. R. 565; Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. R. 121. In the following cases the transaction did not amount to an assignment: Wood *v.* Mitchell, 26 Abb. N. C. 129, 14 N. Y. Suppl. 7; Paige *v.* New York, 11 N. Y. Suppl. 496, 58 Hun, 603.

CHAPTER XI.

RIGHT OF PROPERTY IN BUILDING MATERIALS.

§ 72. General Statement. In connection with erections made upon land, the question of property in the materials used will be answered on quite different principles, according as the affixture of the materials is made (1) against the consent or without the knowledge of the land-owner, or (2) under an understanding of some sort with him; in other words, in connection with a building contract. The first class of cases is discussed in § 74. The second class may involve one of three distinct transactions; (*a*) transactions in which it is a question whether materials were sold to the land-owner or to the contractor: this is a pure question of the relation between carpenter and land-owner; (*b*) transactions in which it is a question whether, at a given stage of building, the materials brought by a contractor, and once belonging to him, have been transferred to the ownership of the land-owner: this is a question of implied intention as to the passing of title under a contract of sale, where no express agreement of the parties is available as a source of information; (*c*) transactions in which the question is as to the effect of express agreement relating to the time of transfer of title from the contractor to the land-owner.

§ 73. Agent or Independent Contractor. Where the arrangement between the land-owner and the builder is merely that the latter shall do work and labor for the former, and incidentally shall have authority as

agent to procure material, the builder of course never acquires any property in materials bought by him for the building, provided he bought as agent for the owner. The test will thus often be whether the materials were furnished to him on the credit of the building, and not on his own credit; in the former case it would usually be clear that he was acting as agent, and the title would vest in the land-owner.[1] But this sort of difficulty can hardly arise under the modern lien laws, which charge the liens of mechanics and material-men upon all material that has gone to the use of the building, irrespective of the ownership of the building. Material-men have no longer a peculiar interest in raising the above question, and other creditors of the contractor would usually find themselves shut out by the prior liens.

A similar question, however, may arise as between owner and builder, where the latter furnishes the material for the structure. The question will be whether the materials are sold outright to the contractor, or are merely bailed to him for the purpose of performing work and labor. In *Crosby* v. *Canal Co.*[2] the defendant furnished lumber to boat-builders for the special purpose of being used in boats made for the defendant, the price of the lumber being deducted from the contract price of the boats; and it was left to the jury, in an action between the transferees of the builders and the defendants, to decide whether the lumber was intended to be bailed or sold.[3]

§ 73 *a*. Passing of Title. Where goods to be transferred to the ownership of another are unspecified, the

[1] White *v.* Miller, 18 Pa. 52.

[2] 59 Hun, 617, 13 N. Y. Suppl. 306.

[3] See same case, 119 N. Y. 334, 23 N. E. R. 786.

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to put up have that effect, for we see the same defendant, at the same time and place, working up other plank of the same lot into materials for columns for Earl's house." Where the structure is to be erected on the land of the buyer, the act of appropriation will thus usually be found to be the final affixture of the materials to the land or the frame of the structure. Thus, in *Manchester Mills* v. *Rundlett*,[1] the act of affixing the unpainted blinds for the purpose of fitting them to the house was not a final affixture, but tentative only. The circumstances of each case must determine.[2] The circumstance that the land-owner appoints an agent to inspect and approve the materials furnished does not necessarily result in passing the title as soon as the agent indicates his approval. This approval simply sets at rest the question of the buyer's assent to the transfer of title. The seller may not, up to that point, have indicated positively his election, and may not until afterwards. He is merely as one saying, "If I decide to appropriate this material by affixture or otherwise, have I your assent?" So in *Tripp* v. *Armitage*,[3] where some sash-frames had been sent to the premises by the builder, approved by the owner's agent, and sent back

[1] 23 N. H. 271.

[2] See Mt. Hope Iron Co. v. Buffinton, 103 Mass. 62 (where an engine was to be constructed, set up, and started in the defendant's factory); Allis v. Voigt (Mich.), 51 N. W. R. 190. See Fairbanks v. Richardson Drug Co., 42 Mo. App. 262, and Pike Electric Co. v. Same, 42 Mo. App. 272, for cases where contracts to furnish respectively an electric-lighting plant and an engine were construed to be for sale, and not for work and labor, and the risk of destruction by fire before completion was held to be on the sellers. Where a sub-contractor was engaged to put up a tank which would not be a fixture when completed, and the contractor failed before it was completed, the title was held to be still in the sub-contractor. Bellamy v. Davey, 1891, 3 Ch. 540. As to the effect of part payments, see Wollensak v. Briggs, 119 Ill. 453, 10 N. E. R. 23.

[3] 4 M. & W. 687.

to the builder's shop and fitted with pulleys belonging to the owner, it was held that, notwithstanding the approval by the agent, the final act of appropriation, the affixture, had not yet taken place, and the builder still owned the sash frames.

Where the contractor prepares the structure upon his own premises, the act of affixing materials to the framework is no longer a satisfactory indication of appropriation. Here it is natural that delivery should be the best test of appropriation, but it is by no means a necessary one.[1] In *Wilkins* v. *Bromhead*,[2] the bankrupt was to make a greenhouse for the plaintiff, and after it was completed, and the plaintiff informed that it was ready for him (though not set up, as it had to be transported to a distance), the plaintiff sent the money and told the maker to keep it till he sent for it. The maker then put it in charge of a third person; but it would seem that the judgment in favor of the plaintiff (against the maker's creditors) might have been supported by the mere act of the maker in placing the house at the plaintiff's disposal; at that moment his appropriation was final.

A class of cases combining features of both the previous classes is formed by the litigation over ship-building contracts. If we are here to take it that the act of affixture of materials is the best test of appropriation, we find that this can be so only where the affixture puts the materials under the control of the buyer, and is for his peculiar benefit, — in other words, where the ship, or the portion finished, is already the property of the buyer. For if it is not, the act of affixture from time to time can have little or no significance, the ship

[1] See Goddard *v.* Binney, 115 Mass. 456.

[2] 6 M. & G. 963.

being itself the property of the builder. The question usually decisive, then, is whether the ship or the finished portion belongs to the contractor or not. In the English cases it is held that an arrangement by which part payments are made at the completion of various stages of the work indicates an intention of the parties that as soon as the first stage is reached, and the payment made, the title to the finished portion shall pass to the owner. The requisition that certain portions shall be finished before payment made, and that payment shall be made when these portions are finished, is taken as an indication that both parties agreed to have the title pass, — the buyer because he wishes security for his money, the builder because he needs the money, and when he has got it he has no objection to transferring title. This is the theory established by *Woods* v. *Russell*,[1] *Clarke* v. *Spence*,[2] *Wood* v. *Bell*,[3] and *Seath* v. *Moore*.[4]

The whole question is admitted, both in England and in the United States, to be one of determining the agreement of the parties, not one of fixed rules; yet in this country the courts have not given to the instalment scheme, or to inspection by a superintendent, the weight allowed in England. The question is, in the United States as in England, whether the parties intended that the title in the first finished portion should pass to the buyer, so as to assimilate the case to that of affixing materials to a freehold; but the same weight is not given to the above circumstances in construing the contract. The two special circumstances of the appointment of an inspector and of payment by in-

[1] 5 B. & A. 942.
[2] 4 A. & E. 448.
[3] 5 E. & Bl. 355, 772.
[4] 11 App. Cas. 350.

stalments are regarded as not necessarily inconsistent with the non-transfer of the title. *Merritt* v. *Johnson*,[1] *Andrews* v. *Durant*,[2] *Briggs* v. *Lightboat*,[3] *Clarkson* v. *Stevens*,[4] are the leading cases.

The Maryland case of *McElderry* v. *Flanigan*[5] takes a position (not very clearly expounded) amounting to this, that where advances are made, and the clear intention is that the specific ship shall be delivered to the buyer, the "general property," in other words the title, passes to the buyer as soon as the advance is made, while the ship-builder retains a lienor's interest to the extent of the amount due and unpaid at any given time, this interest being attachable by his creditors. This view (so far as any general principle can be drawn from the language of the court) seems equitable enough, but is at variance with both the English and the later American rule.

§ 73 *b*. EXPRESS CLAUSES. Mr. Emden recommends,[6] "for the protection of the land-owner, that the building contract should contain a clause to the effect that all building materials brought upon the ground shall immediately become his property." The clause usually provides that the property shall pass either on delivery upon the ground or upon some default of the builder. A clause of the latter sort is usually in the form of a forfeiture. Where delivery upon the premises is specified as the event, the title passes on delivery.[7] When the giving of notice after a default is specified, the time

[1] 7 Johns. 473.
[2] 1 Kernan, 35.
[3] 7 Allen, 287.
[4] 106 U. S. 505.
[5] 1 H. & G. 308.
[6] Emden on Building, 2d ed. p. 200.
[7] Reeves *v.* Barlow, 12 Q. B. D. 436.

of giving notice is decisive.[1] But the event which is to determine the transfer must not be the builder's bankruptcy; this would be in fraud of the bankruptcy laws.[2] The attribution of a right of ownership to the land-owner as soon as the materials are delivered makes it of course necessary to provide for the builder's right to use the material, and to substitute other material where necessary, and to restrict the land-owner from removing it from the premises, or from otherwise interfering with the builder's right to complete the building with these materials. This requires "user" clauses, in addition to the "seizure" and "vesting" clauses, and leads to a complication of provisions which calls for frequent judicial interpretation.[3] But the operation of lien laws has made such clauses of little avail for their prime object, — the protection of the land-owner against the claims of mechanics and material-men, — and they are of little importance at present to American jurisprudence.

§ 74. BUILDINGS ERECTED UPON LAND OF ANOTHER. The general rule of law, that whatever is fixed to a freehold becomes part of it,[4] is applicable to cases where buildings are erected without authority upon the land of another. Thus, where one man voluntarily erects a house or other structure without permission of the owner of the estate, he does not thereby acquire an interest in the land, but on the contrary the building becomes the property of the owner of the

[1] *Ex parte* Dickin, *In re* Waugh, L. R. 4 Ch. D. 524.

[2] *Ex parte* Jay, *In re* Harrison, L. R. 14 Ch. D. 19. See, for a case on the border, *Ex parte* Dickin, *supra*.

[3] *Ex parte* Barter, 26 Ch. D. 510; Hudson on Building Contracts, pp. 386–392; Emden, pp. 200–210.

[4] Baldwin *v.* Reed, 16 Conn. 66; Curtis *v.* Hoyt, 19 Conn. 165; Frank *v.* Brand, 16 Conn. 272.

freehold,[1] and the unlicensed builder is a trespasser upon his land. In a leading English case,[2] where a contract stipulated that all materials brought on the premises by the proposed lessee should become the property of the proposed lessor, but the proposed lessee commenced building without obtaining a lease, it was held that the materials brought on the land by the proposed lessee vested in the owner of the freehold, and were not liable for the debts of the builder. The same rule has been substantially followed in other cases.[3]

§ 75. OLD MATERIALS BELONG TO THE CONTRACTOR. Where a building contract makes no reference to the old structure standing upon the land, the materials therein belong to the builder, and the owner is not entitled to an allowance therefor.[4]

[1] Baldwin *v.* Reed, 16 Conn. 66 (the building is personal property if it belongs to some one other than the land-owner); Curtis *v.* Hoyt, 19 Conn. 165.

[2] Blake *v.* Izard, 16 W. R. 108.

[3] See especially Reeves *v.* Barlow, L. R. 12 Q. B. D. 436, 5 L. J. Q. B. 192, 50 L. T. 782. Houses built by a contractor for a vendee who is in possession of the land, but has paid only part of its price, may not be taken away by the contractor to whom the vendee has turned over the houses by way of payment. Miller *v.* Waddingham (Cal.), 25 Pac. R. 688. See Hendy *v.* Dinkerhoff, 57 Cal. 3.

[4] Morgan *v.* Stevens, 6 Abb. N. C., 356.

CHAPTER XII.

BUILDING NUISANCES, AND DAMAGES FROM NEGLIGENCE WITH AND WITHOUT PRIVITY OF CONTRACT.

§ 76. BUILDING NUISANCES. A nuisance is defined by Blackstone to be "anything that unlawfully worketh hurt, inconvenience, or damage."[1] It is proposed in this treatise to mention briefly those nuisances only which directly relate to buildings.

Nearly every city and town of this country has its own ordinances, or what might be called local statutes, regulating the use of streets and highways for building materials. Although the question of obstructions created by building operations is thus controlled by local law, the authorities generally agree that rights and privileges conferred by such statutes must be exercised reasonably, and with due care not to incommode the public or adjoining property-holders more than is absolutely necessary. If a person blockade convenient access to the property of another, when by proper means he could have done otherwise, he is liable to damages.[2] So if, by his action in taking up more of the thoroughfare than necessary, he commits a *public* nuisance which substantially injures the plain-

[1] 3 Blackstone Com. 216. A *private* nuisance is "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." Ibid. 215. And a public nuisance is "such an inconvenience or troublesome offence as annoys the whole community in general, and not some particular person." 4 Blackstone Com. 166.

[2] Knox *v.* New York, 55 Barb. 404.

tiff.[1] Where there is an unauthorized interference or obstruction of a street or highway, an action lies for special injuries occasioned thereby.[2]

The general statement may be made that any one doing any act which makes the free use of a street dangerous or inconvenient, as by blockading it with building materials, leaving open excavations, failing to put up right signals, undermining the pavement, or in any way incommoding or hazarding the public or individuals, commits a nuisance for which he is liable to any one thereby injured.[3] But if he has obtained a license from the public authorities, and is exercising due care, he will not be liable for accidental injuries.[4]

§ 77. Instances of Building Nuisances. If a man causes a bay-window to be so constructed that it will project over his neighbor's ground, though from an upper story of his building and no damage results thereby, the project is a trespass which may be deemed a nuisance.[5] So, too, if he allows filthy matter[6] or water[7] (if the latter can be prevented) to percolate upon another's land, or drip from roofs;[8] or fails to

[1] Fritz *v.* Hobson, L. R. 14 Ch. Div. 542, 42 L. T. 225.

[2] Whitely *v.* Pepper, 2 Q. B. D. 276, 46 L. J. Q. B. 436; Harris *v.* Mobbs, L. R. 3 Ex. D. 268; Wilkins *v.* Day, 12 Q. B. D. 110.

[3] Kimball *v.* Bath, 38 Me. 219; Robbins *v.* Chicago, 4 Wall. 657. The mere erection of a building contravening in some respect a city ordinance does not make its owner liable for a fire starting within it and spreading, in the absence of specific negligent conduct. Mathiason *v.* Mayer, 90 Mo. 585, 2 S. W. R. 834.

[4] Kimball *v.* Bath, *supra;* Portland *v.* Richardson, 54 Me. 46.

[5] Meyer *v.* Metzler, 51 Cal. 142. See, also, Grove *v.* Fort Wayne, 45 Ind. 429; Cherry *v.* Stein, 11 Md. 1. See further, Ch. xxv.

[6] Ball *v.* Nye, 99 Mass. 582; St. Helen's Chem. Co. *v.* St. Helen's, L. R. 1 Ex. Div. 196.

[7] Wilson *v.* New Bedford, 108 Mass. 261; Brown *v.* Bowen, 30 N. Y. 519.

[8] Bellows *v.* Sackett, 15 Barb. 96; Underwood *v.* Waldron, 33 Mich. 232.

take due care of his water-pipes, and negligently allows leakages to occur, thereby injuring his neighbor's estate;[1] or permits ice and snow to fall upon the same,[2] having first committed a nuisance by so constructing his building as to run the water, etc., in that direction.[3] But if a proprietor causes a well to be excavated upon his own land, and thereby draws off the subterraneous waters to the injury of others using water from the same source, he will not be liable to damages.[4] A building so constructed that snow and ice are likely to slide from the roof into the street below is not necessarily a nuisance, and the owner is only liable if he fails to observe due care in respect to it.[5] Negligently leaving building materials in streets, thereby obstructing the same or frightening horses, may be nuisances;[6] so, also, of a house built so as to obstruct the view of another,[7] or preventing easy access to a building.[8] The continuance of a building erected without authority upon the land of another is a renewed nuisance every day it stands, and the owner of the land may bring new suits after recovery and satisfaction for the original erection.[9]

[1] Blyth *v.* Proprietors etc., 11 Ex. 781; Carstairs *v.* Taylor, L. R. 6 Ex. 217; Killion *v.* Power, 51 Pa. St. 429.

[2] Shipley *v.* Fifty Associates, 106 Mass. 194.

[3] Jackson *v.* Pesked, 1 M. & S. 234; Tucker *v.* Newman, 11 Ad. & El. 40, and Ibid. 6.

[4] Acton *v.* Brundell, 12 M. & W. 324; Smith *v.* Kenrick, 7 C. B. 515. See further, Ch. XXIII.

[5] Garland *v.* Towne, 55 N. H. 55. But see Jager *v.* Adams, 123 Mass. 26. A building so placed and constructed that snow or ice would naturally fall so as to endanger street passengers, is liable for injuries so caused, without regard to the care with which the snow or ice was removed. Smethurst *v.* Congregational Church, 148 Mass. 261, 19 N. E. R. 387; Hannem *v.* Pence, 40 Minn. 127, 41 N. W. R. 657.

[6] Cook *v.* Charlestown, 98 Mass. 80; Foshay *v.* Glen Haven, 25 Wis. 288.

[7] Stetson *v.* Faxon, 19 Pick. 147.

[8] Knox *v.* N. Y., 55 Barb. 404.

[9] Russell *v.* Brown, 63 Me. 203. A fence erected maliciously, for the

A building so negligently constructed, or so greatly decayed, that it is likely to fall upon an adjoining tenement, or upon persons making use of easements over it, is a nuisance.[1]

§ 78. ABATEMENT OF SUCH NUISANCES. The usual remedy for the damage done by building nuisances is an action at law,[2] but sometimes a restraining injunction is sought. An abatement[3] by act of the injured party is rarely resorted to, for the reason that a building is not to be destroyed merely because the use to which it is put is a nuisance,[4] nor because it gives offence to adjacent owners, if the cause of the offence can be otherwise remedied. There are a few cases where the destruction of the building itself has been justified, but these are instances in which the evil could be stopped in no other way, as where a dwelling was burned to prevent disease.[5] On the other hand, where a building was destroyed because of the offensive smells of the business carried on by the proprietor, it was held that the latter could recover the full

sole purpose of shutting out light and air from a neighbor's windows, is a nuisance. Burke *v.* Smith, 69 Mich. 380, 37 N. W. R. 838. An unsightly building erected near the plaintiff's residence is not *per se* a nuisance. Trulock *v.* Merto, 72 Iowa, 510, 34 N. W. R. 307.

[1] Mullen *v.* St. John, 57 N. Y. 567; Grove *v.* Fort Wayne, 45 Ind. 429. In Nordheimer *v.* Alexander, 19 Can. Sup. Ct. 248, the defendant's house was destroyed by fire, and a wall left standing in a dangerous condition. The defendant, with knowledge of this, failed to take precautions, and was held liable for damage caused by the fall of the wall in a high wind. In Simmons *v.* Everson, 124 N. Y. 319, 26 N. E. R. 911; Anderson *v.* East, 117 Ind. 126, 19 N. E. R. 726, a similar rule was applied.

[2] 3 Blackstone Com. 220.

[3] Rolle Abr. 565; 3 Dowl. & R. 556.

[4] Welch *v.* Stowell, 2 Dougl. (Mich.) 332; Barclay *v.* Commonwealth, 25 Pa. St. 500.

[5] Van Wormer *v.* Albany, 15 Wend. 262; Meeker *v.* Van Rensselaer, 15 Wend. 397.

value of his building.[1] So, also, in all cases where the nuisance is not strictly the building itself, but the use to which it is put; as where a house is used for prostitution, or a stable allowed to become so filthy as to give offence.[2]

The abatement of a nuisance by the act of the party injured is a preventive remedy only, and does not preclude the party from his action for damages.[3]

Where a building has been erected in a public street, or without authority on public or private ground, it is evidently such a nuisance as will justify abatement by its destruction.[4]

In *Baldwin* v. *Smith*[5] the question was "whether, when the nuisance consists in a dwelling-house which is inhabited, and which has been wrongfully erected, where the defendant had a right in common, the latter could lawfully pull it down while the family were in it, and the conclusion was that, from the necessary tendency of such an act to a breach of the peace, the law could not permit it."

§ 79. Removing Old Buildings. The operation of tearing down old buildings is one in which more than ordinary care must be taken, not only to prevent damages to adjoining property, but to avoid injuries which

[1] Finley *v.* Hershey, 41 Iowa, 389; Case of Brightman, 65 Me. 426, citing authorities.

[2] Finley *v.* Hershey, *supra;* King *v.* Rosewell, 2 Salk. 459; Ely *v.* Supervisors etc., 36 N. Y. 297.

[3] Pierce *v.* Dart, 7 Cow. 609; State *v.* Moffet, 1 Greene (Iowa), 47.

[4] Barclay *v.* Commonwealth, 25 Pa. St. 503.

[5] Baldwin *v.* Smith, 82 Ill. 162, as cited by Mr. Cooley in his work on Torts, p. 47. "In some cases, however," says the author named, "parties have been justified in removing houses which were nuisances, even while families were in them," citing Davies *v.* Williams, 16 Q. B. 546; Burling *v.* Read, 11 Q. B. 904. But there must be a notice of the intention served upon the occupant. Jones *v.* Jones, 1 H. & C. 1.

may be inflicted upon employees and passers-by.[1] It is the duty of the party at whose instance foundations are excavated, and also of the contractor who undertakes the work, to supply walls and other sufficient support for the adjoining structure. If they, or either of them, remove the lateral support which the old building gave, without taking every possible effort to prevent injury, a nuisance is committed.[2] Yet, if the adjoining land be built upon, the responsibility will be changed,[3] for in such cases the owner or his builder will be in duty bound to notify the adjoining neighbor before proceeding,[4] and then use due care in executing the work;[5] but the owner will not be responsible if he takes these precautions,[6] unless the right of lateral support is acquired by right or prescription as an easement.[7] It has been accordingly held that one cannot underpin a party-wall unless it can be done without injury to the adjoining house.[8]

§ 80. SUPPORT. Where one building or structure of any description is located underneath another, he who

[1] In Bickford *v.* Richards, 154 Mass. 163, 27 N. E. R. 1014, there was said to be privity of contract between the owner and a sub-contractor for the removal of buildings, so as to allow recovery against the latter by the former for defective performance.

[2] Wyatt *v.* Harrison, 3 B. & Ad. 871; Partridge *v.* Scott, 3 M. & W. 220; Quincy *v.* Jones, 76 Ill. 231; Thurston *v.* Hancock, 12 Mass. 220.

[3] Cases cited above, and Cahill *v.* Eastman, 18 Minn. 324; McMillan *v.* Watt, 27 Ohio (N. S.), 306.

[4] Brown *v.* Werner, 40 Md. 15; Wyley Canal Co. *v.* Bradley, 7 East, 368; Massey *v.* Goyder, 4 C. & P. 161.

[5] Jeffries *v.* Williams, 5 Ex. 792; Charles *v.* Rankin, 22 Mo. 566; Baltimore & O. R. R. *v.* Reaney, 42 Md. 117.

[6] Ibid. See Peyton *v.* Mayor etc., 9 B. & C. 725.

[7] See *post*, chapter on Support, Part III.; also, Washb. on Easements (3d ed.), 547.

[8] Pfluger *v.* Hocken, 1 F. & F. 142; Bradbee *v.* Christ's Hosp. etc., 2 D. N. S. 146, 4 M. & G. 714, 5 Scott N. R. 79.

builds above or below is likewise bound to exercise due care and skill in his excavations, or otherwise removing the subjacent support.[1] Indeed, if he removes the natural support of the upper estate, he must substitute that which is sufficient to protect the same; if he fails to do so he is liable for damages, though no other negligence on his part be shown.[2] There is, however, some doubt whether a party engaged in mining operations is bound to provide for support of *buildings* upon the land above him. If, however, he fails to supply sufficient support for the *land* itself, there can be no doubt as to his liability, or if the buildings have been upon the land long enough to gain the right of remaining by prescription.[3]

§ 81. Liability of Owner of Building. The owner of the building improvements is liable for the torts of his builder when the latter is acting by his authority and the tortious acts are confirmed or ratified. The rule is the same where a principal orders his agent to commit a wrong; both are responsible as joint wrongdoers.[4] Thus, if a land-owner orders a building to be erected which cannot be done without injury to another person, he is liable to that person for the wrong perpetrated.[5]

But the owner of a building is not responsible for the construction of defective buildings, causing injuries to other property-owners, if he employed competent

[1] Smith *v.* Darby, L. R. 7 Q. B. 716.

[2] Hilton *v.* Lord Granville, 5 Q. B. 701; Horner *v.* Watson, 79 Pa. 242.

[3] Bononi *v.* Backhause, El., Bl. & El. 622, 9 H. L. Cas. 503; Fisher *v.* Beard, 32 Iowa, 346.

[4] Woollen *v.* Wright, 1 H. & C. 554, 31 L. J. Ex. 513.

[5] Addison on Torts, 86; Cooley on Torts, 128; Wilson *v.* Peto, 6 Moore, 49.

contractors or mechanics to build for him.[1] Yet a landlord, seeking to protect his building from injury by making excavations on adjoining land, is liable to the tenant for damages if the building falls or becomes untenantable by reason of negligence of his workmen.[2]

The general rule is, that where the builder contracts to do the entire work, employing his own mechanics, assuming entire charge over the construction of the building, the owner cannot be held liable for injuries caused by the builder during the progress of the work.[3] The authorities have long since settled that an independent contractor is not the servant of his employer.[4] So, where a builder is not working under the direction or control of the owner, but under a contract with him to perform a lawful undertaking, the latter will not be responsible for the negligence of the former's servants.[5]

[1] Brown *v.* Cotton Co., 3 H. & C. 511; Ryan *v.* Fowler, 24 N. Y. 410; Homan *v.* Stanley, 66 Pa. 464.

[2] McHenry *v.* Marr, 39 Md. 510; Toole *v.* Beckett, 67 Me. 544; Campbell *v.* Portland Sugar Co., 62 Me. 552.

[3] Searle *v.* Laverick, L. R. 9 Q. B. 122; Murrie *v.* Currie, L. R. 6 C. P. 24; Steele *v.* S. E. Ry. Co., 16 C. B. 550.

[4] Cooley on Torts, 547, citing Cincinnati *v.* Stone, 5 Ohio N. S. 38, 41; Hale *v.* Johnson, 80 Ill. 185, and others.

[5] Per Walker, J., Scammon *v.* Chicago, 25 Ill. 424, 438; Hilliard *v.* Richardson, 3 Gray, 349; Allen *v.* Willard, 57 Pa. 374; Eaton *v.* European R. R. Co., 59 Me. 520 (railroad not responsible for negligent fires set by contractors while building the road). To the same effect are: Booth *v.* Rome etc. R. Co., 63 Hun, 624, 17 N. Y. Suppl. 386, where the contractor was blasting rock for a railroad; Bibb's Adm'r *v.* Norfolk etc. R. Co., 87 Va. 711, 14 S. E. R. 163, where the contractor was repairing a bridge for a railroad company; Fulton R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. R. 828, where the contractor was constructing a street railway; Long *v.* Moon, 107 Mo. 334, 17 S. W. R. 810, where the contractor was putting in an elevator; Scarborough *v.* R. Co., 94 Ala. 497, 10 So. R. 316, where the contractor was a construction company using cars of the defendant, but in complete control of the road; Geer *v.* Darrow, 61 Conn. 230, 23 Atl. R. 1087, where the contractor was building a wall for a municipal corporation and had full control of the workmen, but was paid according to days' work; Charlebois *v.* R. Co., 91 Mich. 59, 51 N. W. R. 812, where

"Where the contract," says Mr. Cooley,[1] "is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it,

the contractor was constructing an embankment and had not given up charge of the work; Vincennes Water Supply Co. *v.* White, 124 Ind. 376, 24 N. E. R. 747, where the contractor was constructing water-works and was in full control; Moline *v.* McKinnie, 30 Ill. App. 419, where the contractor was putting up a building and was in possession of the premises.

In Pye *v.* Faxon (Mass.), 31 N. E. R. 640, the owner was held not liable for damage caused by the dropping of mortar and bricks through the contractor's negligence, the damage not being a necessary result of the erection of the wall. In St. Louis R. Co. *v.* Hopkins, 54 Ark. 209, 15 S. W. R. 610, the owner was held liable for the fall of a sign taken off and replaced by an electric light company in doing work for the owner. In Sawyer *v.* Martins, 25 Ill. App. 521, the owner was held not liable for the negligence of a third person who was permitted to enter and take down for his own use a sign left by an outgoing tenant. In Davie *v.* Levy, 39 La. Ann. 551, 2 So. R. 395, it was said that the owner is not liable where the wrongful act of the contractor is purely collateral to the work to be done.

In Larson *v.* Metrop. R. Co. (Mo.), 19 S. W. R. 416, the defendant's engineer had the direction of an excavation and the power of discharge, and the defendant was held responsible. In Fitzpatrick *v.* C. & W. I. R. Co., 31 Ill. App. 649, the fact that the defendant reserved the right to have its architect superintend and direct the building was held not sufficient to fix responsibility upon it. In Nugent *v.* Atlas S. S. Co., 61 Hun, 626, 16 N. Y. S. 66, the defendant was exonerated, where a defective rope in a staging was furnished by the contractors, though the defendant owners were under contract to furnish the ropes. In Mumby *v.* Bowden, 25 Fla. 454, 6 So. R. 453, the owner was held liable where the work of the contractor consisted only in some repairs of a gutter. In Campbell *v.* Lunsford, 83 Ala. 512, 3 So. R. 522, the owner was held liable where the work was under the direction of a supervising architect subject to the owner's control. In Lancaster *v.* Conn. Mut. L. Ins. Co., 92 Mo. 460, 5 S. W. R. 23, the owner was held liable where the injury resulted from defective plans, and not from the contractor's workmanship. Cf. Wilkinson *v.* Detroit S. & S. Works, 73 Mich. 405, 41 N. W. R. 490.

In Doran *v.* Flood, 47 Fed. R. 543, the owners were held not liable for a death caused by the negligence of a sub-contractor in dragging piles through the street. In Hackett *v.* W. U. Tel. Co., 80 Wis. 187, 49 N. W. R. 822, where the carelessness of a foreman hired by the railroad company doing the work for the defendant was the cause of the injury, the defendant was exonerated.

[1] Torts, 548.

and no general control reserved either as respects the manner of doing the work, or the agents employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence." [1]

The mere fact that the owner pays the builder's workmen does not affect the case so as to constitute him their master.[2] So, where the plaintiff contracted with the defendant to build a dam with stone, which he obtained as part payment of another contract to remove the stone by blasting. He and his workmen were paid by the day, the defendant furnishing the powder for blasting, and superintending the building of the dam, but having no control over the blasting; it was held he was not a servant.[3] But the owner may make himself liable by interfering with the builder. For instance, where a contractor was employed to drain a common sewer, and the workmen placed gravel on the highway, to the injury of the plaintiff, and the owner, upon being informed, promised to remove the heap, but the contractor employed a workman to do the work and charged the owner for the same, it was held that the owner was liable, on the ground that he had interfered with the work.[4]

The rule is further illustrated by cases where an

[1] Citing Shearm. & Redf. on Neg. § 73, and Schouler on Dom. Rel. 644.
[2] Rourke *v.* White Moss Colliery Co., 1 C. P. D. 556.
[3] Corbin *v.* American Mills, 27 Conn. 274.
[4] Bower *v.* Peat, L. R. 1 Q. B. D. 321, 45 L. J. Q. B. 446; Hughes *v.* Percival, 8 App. Cas. 444.

architect was employed to pull down a party-wall;[1] a mechanic to dig a drain;[2] a contractor making a viaduct;[3] a gas-fitter employed by a builder;[4] contractors employing sub-contractors who commit torts;[5] sub-contractors paving streets;[6] a railway company employing contractors to construct the road, and sub-contractors for various parts of the same work,[7] — in all of which it was held that the employer was not liable.

Where a builder assents to his workman employing another workman, he is liable for the negligence of the latter, so long as he controls them both;[8] but if he abandons all control or superintendence over the one, the workman thus employed becomes the servant of the first alone.[9] The same rule establishes the non-responsibility of the contractor for negligence of a sub-contractor and his servants.

But where the contract is to perform some work which will necessarily or probably injure others, the owner cannot escape liability by having the work done by a contractor;[10] for if he orders that to be performed which he knows will create a nuisance, the act done by the performer is substantially his act, and he as well as the builder will be responsible for it.[11] He will also

[1] Butler *v.* Hunter, 7 H. & N. 826.
[2] Allen *v.* Hayward, 7 Q. B. 960; Steele *v.* S. E. Ry., 16 C. B. 550.
[3] Reedie *v.* L. & N. W. Ry. Co., 4 Ex. 244.
[4] Rapson *v.* Cupitt, 9 M. & W. 710.
[5] Pearson *v.* Cox, L. R. 2 C. P. D. 369.
[6] Overton *v.* Freeman, 11 C. B. 867.
[7] Knight *v.* Fox, 1 Ex. 721.
[8] Holmes *v.* Union, 2 C. B. N. S. 790.
[9] Dayrell *v.* Tyrer, E. B. & E. 899.
[10] Chicago *v.* Robbins, 2 Blackf. 418; Clark *v.* Fry, 8 Ohio (N. S.), 358.
[11] Ibid.; Ellis *v.* Sheffield Gas Co., 2 El. & Bl. 767, 25 L. J. Q. B. 42; Brownlow *v.* Met. Board etc., 16 C. B. N. S. 546, 33 L. J. C. P. 233. On the question whether the defendant has had a positive duty imposed on him which he may not shift on the shoulders of others, see Guar-

be liable if he agrees to perform part of the undertaking, and the injury arises from his own neglect,[1] or if he fails to see after completion that the contractors leave the work in safe condition;[2] so, again, if he employs even a competent builder to execute work which will probably injure his neighbor.[3] Even when he orders every possible precaution to be taken, and there is but slight risk to adjoining property, he is bound to see that the precautions are actually taken, and to repair any injuries occasioned by the negligence of his builder;[4] so, where the builder expressly agreed to undertake all risks of excavating near the plaintiff's wall upon the property of the defendant, it was held that the latter was liable for neglect of the builder in providing sufficient means to prevent it from falling.[5]

§ 82. Liability of the Builder for Negligence of his Workmen. The relation of the builder to his employee is that known in law as master and servant. A master is liable for the negligent acts of his servant resulting in injury to others, for the reason that the servant, while he is engaged in the business of the master, is supposed to be acting under, and in conformity to, his directions.[6] So, if a builder in constructing a building permits his employees to proceed with the work with-

dians of Holborn Union *v.* St. Leonard's, 2 Q. B. D. 145; Gray *v.* Pullen, 11 L. T. R. N. S. 569; Ellis *v.* Strand District Board, in 93 Law Times, 354.

[1] Gilbert *v.* Beach, 5 Bosw. 445.

[2] Smith *v.* Milne, 2 Dowl. 290 (where a hole was left open by a plasterer).

[3] Angus *v.* Dalton, L. R. 4 Q. B. D. 162, 6 App. Cas. 740.

[4] Bower *v.* Peat, L. R. 1 Q. B. D. 321, 45 L. J. Q. B. 445, and cases just cited.

[5] Ibid. See, also, the leading case of Hughes *v.* Percival, L. R. 8 App. Cas. 444, 52 L. J. Q. B. 719, 49 L. T. 189.

[6] Per Walker, J., in Scammon *v.* Chicago, 25 Ill. 424, 438.

out providing any protection against the *débris* falling upon passers-by, he (the builder) will be liable if a falling brick injures a traveller, although his servants have exercised due care.[1] A builder is bound to take reasonable care in the selection of his workmen, and to take reasonable care to furnish them with adequate materials. He is liable in damages, also, if he employs too few men to perform work where the employment of a sufficient number would have prevented the injury.[2]

Thus, a builder will be held liable for injuries caused by the falling of a defective scaffolding;[3] falling of badly hung gates;[4] by putting a workman who knew nothing about scaffolding under a defective one;[5] by employing a man who was afterwards injured by shoring an arch which the builder had reasonable cause to believe dangerous;[6] by leaving a pole in the ground for an unreasonable time;[7] by using a defective ladder to the injury of his workmen.[8] Where, however, the workman is not following the employment for

[1] Jager *v.* Adams, 123 Mass. 26. So where a servant employed another man to throw snow off of a roof. Simmons *v.* Monier, 29 Barb. 419. In Angus *v.* Lee, 40 Ill. App. 304, it was held that no duty existed to build a staging so as to prevent the dropping of materials, the construction being that of an interior wall, where the presence of persons below would not be expected. Compare Pye *v.* Faxon, p. 138, *ante*.

[2] Saxton *v.* Hawksworth, 26 L. T. 851. In Ross *v.* Walker, 139 Pa. 42, 21 Atl. R. 157, the principal was held not liable, after having provided suitable material for a scaffolding, for an error of judgment on the foreman's part in selecting a defective piece.

[3] Coughtry *v.* Globe Woollen Co., 56 N. Y. 124; Wilson *v.* Merry, L. R. 1 S. & D. 326, L. R. 1 H. L. Sc. 326; Allen *v.* New Gas Co., L. R. 1 Ex. Div. 251, 45 L. J. Ex. 668.

[4] Allen *v.* New Gas Co., *supra*.

[5] Conolly *v.* Poillon, 41 Barb. 366.

[6] Ogden *v.* Rummens, 3 F. & F. 751.

[7] Webb *v.* Rennie, 4 F. & F. 608.

[8] Williams *v.* Clough, 3 H. & N. 258.

which he was engaged, the builder will not be responsible for injuries to third persons resulting from his negligence.

§ 83. Misconduct not within Scope of Employment. It is a builder's duty to see that his employees observe due care, and take every precaution to prevent damage ensuing. He is liable if he does not give timely warning to all persons likely to be endangered by his undertaking. Thus he is liable for damages resulting from the negligence of his foreman or superintendent in failing to keep up proper danger signals, or in darkening ancient lights of adjoining property.[1] In such a case the foreman is also responsible.[2] So, also, where he permits acts of trespass by sub-contractors and others.[3]

But a builder would not be responsible if he had given his workmen positive orders which, if obeyed, would have avoided the accidental injury complained of.[4] For, as says Mr. Justice Hoar: "If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable."[5]

There are, however, numerous cases in the books tending to show that it is immaterial whether the servant is disobeying the orders of the master or not, and that the latter must not only give proper direc-

[1] Wilson *v.* Peto, 6 Moore, 49.

[2] Ibid., and Stone *v.* Cartwright, 6 T. R. 411.

[3] Monk *v.* Dillon, 10 L. R. (Irish) 349, 12 L. R. (Irish) 321 (where the engineer was also held liable).

[4] Durgin *v.* Munson, 9 Allen, 396.

[5] Howe *v.* Newmarch, 12 Allen, 49, 57; Fraser *v.* Freeman, 43 N. Y. 566; McManus *v.* Crickett, 1 East, 106.

tions, but must see that they are carried into effect,[1] and is liable so long as the servant is engaged in transacting his business or usual employment.[2] So where the master has informed the servant that certain acts will be within the scope of his duties, or where the acts are usually performed by the servant, the master will be liable.[3] The authorities are conflicting as to whether a master is responsible for a *wanton* act of his servant during the ordinary course of his employment.[4]

§ 84. Builder's Liability to his Workman.[5] It is well settled that the employer is not responsible to his employee for injuries received while engaged in the occupation for which he was employed.[6] The courts hold to the doctrine that, as he who voluntarily undertakes to do certain work does so in view of all the dangers incidental thereto, he may be presumed to have contracted that he would hazard his chances.[7] If he desires to avoid the risks naturally resulting from his service, he can avoid them at his pleasure by resigning, but if he remains at the work he must hazard the consequences.[8]

The rule exempting the master from liability to his

[1] Paulmier *v.* Erie R. R. Co., 34 N. J. 151; Duggins *v.* Watson, 15 Ark. 118.

[2] Moir *v.* Hopkins, 16 Ill. 313; Rounds *v.* Delaware etc. R. R. Co., 64 N. Y. 129; Coleman *v.* New York R. R. Co., 106 Mass. 160; Brucker *v.* Fremont, 6 T. R. 659.

[3] Barwick *v.* Eng. Joint Stock Co., L. R. 2 Ex. 259, 36 L. J. Ex. 147.

[4] Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 497; Croft *v.* Alison, 4 B. & Ald. 590; Shearman on Negligence, § 66, p. 85. Where a carpenter set fire to a shed while smoking his pipe, his employer was held not to be liable. Williams *v.* Jones, 3 H. & C. 602.

[5] See an article on "Employer's Liability," by John F. Dillon, in 25 Amer. L. Rev. 175.

[6] Hutchison *v.* York & Newcastle Ry. Co., 5 Ex. 350; Priestly *v.* Fowler, 3 M. & W. 1, 6; Ill. Cent. Ry. *v.* Cox, 21 Ill. 20, 26.

[7] Wigmore *v.* Jay, 5 Ex. 354; Hanrathy *v.* N. C. R. R. Co. 46 Md. 280.

[8] Wigmore *v.* Jay, *supra.*

servants has been extended to those cases in which the injury results from the negligence of other servants in the same employment.[1] But if the master works with his servants and injures one of them by his own negligence, he is responsible.[2] So, also, where a servant is injured by another, whose service is in a distinct branch of the employment, as where a carpenter was employed on buildings and injured by the negligence of a yard-master in making up trains;[3] but this class of exceptions is not generally recognized by the courts as an exception to the rule.[4] Therefore a builder is not liable for injuries to his workmen caused by mechanics employed under a sub-contractor engaged in doing piece-work,[5] or to a former employee,[6] any one under the control of his foreman,[7] laborers erecting scaffolding,[8] or a volunteer assistant.[9]

§ 85. Injuries from Builder's own Negligence. If the builder is himself negligent, he is responsible if his negligence causes injury to his workmen, just as much as he would be if the legal status of master and servant did not exist. So where he has been informed by his employee of certain dangerous defects, and

[1] Hutchinson *v.* York & Newcastle Ry. Co., 5 Ex. 350; Farwell *v.* Boston etc. R. R. Co., 4 Met. 49; Ill. Cent. R. R. Co. *v.* Cox, 21 Ill. 20; Railroad Co. *v.* Fort, 17 Wall. 462.

[2] Ashworth *v.* Stanwix, 3 El. & El. 701; but see Mellors *v.* Shaw, 1 Best & S. 437.

[3] Morgan *v.* Ry. Co., L. R. 1 Q. B. 149; Nashville etc. R. R. Co. *v.* Carroll, 6 Heisk. 347; Toledo R. R. Co. *v.* Moore, 77 Ill. 217, and particularly p. 391.

[4] Gilman *v.* Easton R. R., 10 Allen, 233; Wonder *v.* B. & O. R. R. Co., 32 Md. 411; Albio *v.* Agawam Co., 6 Cush. 75.

[5] Wigget *v.* Fox, 11 Exch. 832, S. C. 36 E. L. & Eq. 486.

[6] Wilson *v.* Merry, L. R. 1 S. & D. 326, L. R. 1 H. L. Sc. 326.

[7] Feltham *v.* England, Law Rep. 2 Q. B. 32, 36 L. J. Q. B. 14.

[8] Gallagher *v.* Piper, 33 L. J. C. P. 329, 16 C. B. N. S. 669.

[9] Potter *v.* Faulkner, 1 B. & S. 800, 1 H. & N. 773.

promises to make repairs, but fails to do so, and the party is injured while the promise still holds good.[1] So, again, where he negligently subjects his workmen to dangerous buildings or machinery, where there are latent perils, of which they know nothing.[2] This last statement may not be borne out in all cases, as where a railroad company was held not to be liable for an injury to one of its employees occasioned by a latent defect in one of its bridges, when competent persons had been employed to examine the bridge.[3]

It must not be inferred from the rule just stated that a builder is bound to see that his buildings are safe beyond all contingencies, or that he exercise *extraordinary* care in guarding against accidents. Although he is in duty bound to reasonably provide for the safety of his servants, there are degrees of responsibility arising from the age, construction, and character of the buildings, and much depends upon the workmen's opportunities to judge of these dangers and contingencies.[4]

Other instances of a builder's liability to his workmen arise from the following general rules: 1st. Where the master (builder) commands his servant (employee) to undertake risks the nature of which they have no

[1] Patterson *v.* Wallace, 1 Macq. H. L. 748; Clark *v.* Holmes, 7 H. & N. 937.

[2] Latham *v.* Roach, 72 Ill. 179; Beck *v.* Carter, 68 N. Y. 283.

[3] Warner *v.* Erie R. R. Co., 30 N. Y. 468; Ladd *v.* New Bedford etc. R. R. Co., 119 Mass. 412.

[4] In Dalheim *v.* Lemon, 40 Fed. R. 225, the duty of supplying safe appliances to employees was held to exist in favor of a convict working gratuitously for a contractor within the prison. In Diamond S. I. Co. *v.* Giles (Del.), 11 Atl. R. 189, the plaintiff was a carpenter injured by the fall of the building on which he was working, and the question was held to be whether the owner had exercised reasonable care in the erection of the building. See an article on "Warnings to Workmen," by J. O. Pierce, 25 Amer L. Rev. 591.

reason to suspect, and which are not within the scope of their employment.[1] 2d. Where the master (builder) is guilty of negligence in exposing persons of youth or inexperience to perils they could not comprehend.[2] 3d. Where the master (builder) employs machinery, scaffolding, etc., which he knows to be defective, particularly if he has been warned.[3] He does not, however, warrant his machinery, etc., to his employees, and is only responsible when he fails to use due care in the matter.[4] 4th. Where the master (builder) can be shown to have been extremely careless or negligent in selecting competent workmen.[5] 5th. Where the master (builder) promises to correct defects, upon being informed of them by the servant (employee), but neglects to do so.[6]

A workman cannot recover against his employer if his own negligence contributed, with that of the latter, in producing the injury.[7]

[1] Malone *v.* Hawley, 46 Cal. 409; Baltimore & O. R. R. Co. *v.* Woodward, 41 Md. 268.

[2] Grizzle *v.* Frost, 3 Fost. & F. 622; O'Connor *v.* Adams, 120 Mass. 427; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572.

[3] Latham *v.* Roach, 72 Ill. 179 (defective scaffold falling); Coughtry *v.* Globe Woollen Co., 56 N. Y. 124.

[4] Readhead *v.* Midland G. Ry. Co., 2 Q. B. 412; Ladd *v.* New Bedford R. R. Co., 119 Mass. 412.

[5] Mobile R. R. Co. *v.* Thomas, 42 Ala. 672; Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, L. R. 1 S. & D. 326.

[6] Laning *v.* N. Y. Cent. R. R. Co., 49 N. Y. 521; Patterson *v.* Wallace, 1 Macq. H. L. 748.

[7] Burns *v.* Boston etc. R. R. Co., 101 Mass. 50. The various doctrines of contributory negligence are not within the province of this treatise. See, however, Woodley *v.* Metropolitan Ry. Co., L. R. 2 Ex. D. 384, 4 Am. Law Times Rep. 452.

In the following case of injuries by the defendant's employee, it was held that the plaintiff and the wrong-doer were not fellow-servants in the defendant's employ: Johnson *v.* Lindsay, 1891, App. Cas. 371, where the defendants were doing the iron work on a building, and the plaintiff was employed by a separate firm of builders about the same building.

In the following case the culpable party was treated as the vice-principal of the owner, and the employee allowed to recover: Haworth *v.* Seevers M'f'g Co. (Iowa), 51 N. W. R. 68, where the vice-principal was a carpenter employed to supervise the erection of a building, and the injury was caused by a defective scaffold.

In the following cases the plaintiff and the wrong-doer were held to be fellow-servants: Hughes *v.* Fagin, 46 Mo. App. 37, where the plaintiff was a carpenter at work on the construction of the building, and the wrong-doer an elevator boy; Marsh *v.* Herman, 47 Minn. 537, 50 N. W. R. 611, where both parties were at work on a building, and the wrong-doer defectively constructed a scaffold; Cunningham *v.* Washington Mills Co. (Mass.), 26 N. E. R. 235, where the plaintiff was a mason laying a foundation, and the wrong-doers were a carpenter and some machinists; Hoar *v.* Merritt, 62 Mich. 386, 29 N. W. R. 15, where the plaintiff was a painter working on a scaffolding put up by carpenters working on the same job; L. & N. R. Co. *v.* Lahr, 86 Tenn. 335, 65 W. R. 663, where the plaintiff was a carpenter, and his foreman, in carelessly assuring him that a rope was made fast, was held not to be acting as vice-principal; Keith *v.* Walker I. & C. Co., 81 Ga. 49, 7 S. E. R. 166, where the plaintiff was a carpenter, and the wrong-doer a mason engaged on the same building; Somer *v.* Harrison (Pa.), 8 Atl. R. 799, where the plaintiff was an iron-worker, and the wrong-doer was clearing away rubbish from the building.

In the following cases the employee was held to have assumed the risk of the injury: Schwartz *v.* Cornell, 59 Hun, 623, 13 N. Y. Suppl. 355, where he knew of a dangerous hole in the floor and elected to work near it; Carey *v.* Sellers, 41 La. Ann. 500, 6 So. R. 813, where trusses had fallen in the course of demolishing a building, and the workmen had been repeatedly warned not to get under them; Church *v.* Appleby, 58 L. J. Q. B. 144, 60 L. T. 542, where the workman knew of the defect of a staging.

PART II.

BUILDING LEASES.

CHAPTER XIII.

PRELIMINARY AGREEMENTS TO LEASE.

§ 86. AGREEMENTS FOR BUILDING LEASES. It is sometimes desirable, before entering into a lease of land, to execute an agreement to lease. This is most frequently done when the commencement of the term is postponed to some future time, or the final lease is dependent upon the completion of the building or other contingencies. Such agreements must in all cases be in writing, being within the fourth section of the Statute of Frauds;[1] but a contract *after* a lease has been made, that the landlord shall improve the premises, may be entered into verbally, not being within the statute.[2] So, again, although every grant of an interest in land for permanent use must be in writing, whether for the purpose of erecting or repairing a building, a mere permission to go upon land for a definite purpose and perform certain acts, when not intended to pass title, is not required to be in writing.[3] But an executory agree-

[1] See 5 Ad. & E. 856; Browne, Stat. of Frauds, 501–532. A lease to commence *in futuro* may be made in Maryland for a term not exceeding three years. Union Bank *v.* Gittings, 45 Md. 181.

[2] Woodfall, Landlord and Tenant, 81, 85; Williams *v.* Brisco, L. R. 22 Ch. D. 441, 48 L. T. 198.

[3] Cook *v.* Stearns, 11 Mass. 533; Phillips *v.* Thompson, 1 Johns. Ch. 131; Dubois *v.* Kelly, 10 Barb. 496.

ment for a lease contemplates more of an interest in land than this; it is clearly for a *future* interest, and practically, in most cases, an assignment of a *present* interest in land; so that, unless the intention of giving merely an interest *in futuro* is expressed or implied from the nature of the agreement, and an inference can be reasonably drawn that it is not to run from the day of the agreement, it will not comply with the statute unless some memorandum thereof be made in writing.[1]

§ 87. LEASES DEFINED. A lease is usually defined as "a species of contract for the possession and profits of lands and tenements, either for life or for a certain term of years, or during the pleasure of the parties;"[2] as Dr. Washburn puts it, "an estate created by a contract, whereby one man, called the lessor, lets to another, called the lessee, the possession of lands or tenements for a term of time fixed and agreed upon by the parties to the same."[3] An *under-lease* is created where a lessee parts with a portion of the estate which has been granted to him. If he disposes of his whole interest, he makes what is called an assignment thereof.

[1] Marshall *v.* Berridge, 19 Ch. D. 233.

[2] Bouvier, Law Dictionary.

[3] Washburn, Real Property, 291, citing Smith, Land and Ten. 18. Prior to the time of taking possession of the property, the interest which the lessee has in the land is called an *interesse termini*. Williams, Real Prop. 329. A mere authority from the owner of land to another to take possession of it, not accompanied by anything showing a contract for the possession and profits on one side, and for a recompense to be made on the other, will amount to a license, but not to a lease, nor would it convey an estate or interest in the land. Goodman *v.* Jones, 26 Conn. 268. A term or lease for years is a chattel. Webster *v.* Parke, 42 Miss. 461; Montgomery *v.* Dillingham, 3 Smedes & Marshall (Miss.), 647. So a lease for 99 years is personal property, and does not descend to the heir, but is assets in hands of administrator. Allender's Adm'r *v.* Sussan, 33 Md. 11.

A lease for the life of a person not in existence is void by reason of indefiniteness,[1] but a lease for the lives of several persons is valid as to those named who are living.[2]

§ 88. Distinction Between a Lease and an Agreement to Lease. The distinction between a contract for future lease and an actual lease is one of great importance, for the reason that the latter, if contained in a single instrument, cannot be altered by extrinsic evidence, while the former is sometimes subject to variation by additional covenants, and explainable by competent testimony.[3] The courts, in determining whether an instrument is to be construed as a lease or as an agreement for a lease, will follow the usual rules of construction, looking mainly to what appears to be the intention of the parties.[4] If the contract entered into leaves nothing to complete it, but takes effect immediately, it acts as a present demise or lease.[5] So, where the preliminary agreement provides that it shall be binding until a more formal lease is executed, it is complete in itself until succeeded by a lease, and will be considered as a present lease.[6] Thus where, by the agreement, a man was to expend £2,000 in building upon the land of another, upon the condition that the owner of the land was to grant him a lease as soon as the house was

[1] Updike *v.* Campbell, 4 E. D. Smith, 570.

[2] Doe *v.* Edwards, 1 Mees. & W. 553.

[3] 1 Washb. Real Prop. 300; Anderson *v.* Critcher, 11 G. & J. (Md.) 450.

[4] Hallett *v.* Wylie, 2 Johns. (N. Y.) 47, 9 N. Y. 44; Wright *v.* Trevezant, 3 Carr. & P. 441; Doe *v.* Ries, 8 Bing. 178.

[5] Doe *v.* Ries, *supra*. An agreement to give a lease in the future does not create a relation of tenancy in every respect, but if possession is given under it, the occupier is entitled to a notice to quit. Neppach *v.* Jordan, 15 Or. 308, 14 Pac. R. 353.

[6] Shaw *v.* Farnsworth, 108 Mass. 357.

roofed, the court held that this was a present lease.[1] Again, an agreement to build a wharf, to be used by the grantee at a stipulated rent, was construed as a present lease.[2] So, where the owner "agreed to rent and lease" certain land to a gas company, which, acting upon this agreement, stored material upon it for building on adjoining land, the agreement was held to be a lease.[3]

Words of demise, when used in an instrument, do not always determine its nature. For instance, where a paper contained such words, followed by a stipulation on the part of the land-owner to make certain alterations and improvements, and the other party to take a lease, the court construed the instrument, according to the evident intention of the parties, to be an agreement for a lease.[4] So where a builder agreed to make certain repairs for a fixed sum to be paid when the work was completed, and the owner agreed that the builder should hold the premises, the contract was construed as a simple agreement and not a lease.[5] So, again, where there were words of present contract used that the lessee should take immediate possession, and a future lease be made, it was construed as only an agreement to lease.[6]

[1] Poole *v.* Bentley, 12 East, 168.

[2] People *v.* Kelsey, 14 Abb. Pr. 372.

[3] Kabley *v.* Worcester Gas Co., 102 Mass. 392; Stanforth *v.* Fox, 7 Bing. 59.

[4] Jackson *v.* Delacroix, 2 Wend. 433; Poole *v.* Bentley, 12 East, 168.

[5] People *v.* Gillis, 24 Wend. 201.

[6] Goodtitle *v.* Way, 1 T. R. 735. See Adams *v.* Hagger, L. R. 4 Q. B. D. 480; Poole *v.* Bentley, 12 East, 168. A mere agreement to lease for 99 years, signed by only one of the parties, is an inchoate instrument, and passes no interest. Howard *v.* Carpenter, 11 Md. 259. *Agreements to Renew.* A stipulation in a lease that the lessee should "have the first right" to lease on expiration of the term is not an engagement to renew. Reed *v.* Campbell, 43 N. J. Eq. 406, 4 Atl. R. 433. For a case in which the lessee was held, on the facts, to have assented to the renewal of the

§ 89. Suggestions Concerning Agreements for Leases. In the preparation of the preliminary agreement to let lands for building purposes, great care should be observed that no essential conditions are omitted. All the covenants to be followed in the subsequent lease should be stated, to avoid disputes. Indeed, the lease to be executed *in futuro* is often dependent entirely upon the stipulations contained in the agreement, which may in many cases properly be termed a temporary lease, serving as it does this purpose *ad interim*. Thus, in *Bacon* v. *Bowdoin*,[1] though the lessor was in terms to complete the building, and the lessee was to have a right to use it for certain purposes from the date of the agreement, the agreement was construed as a present lease.

If it is intended that the tenant shall pay taxes or damages of any kind, or keep the property in repair, or rebuild in case of fire, or insure for the benefit of the landlord, or have the privilege of assigning his interest, it is proper so to specify in the agreement, for there may be valid objections to such stipulation when the time for executing the lease arrives; and it is well settled that, as all negotiations between the parties prior to or contemporaneous with the lease are merged into the lease, no evidence can afterwards be admitted to vary its terms.[2]

It is always well to provide either that the owner of

lease as per agreement, see Leiter *v.* Pike, 127 Ill. 287, 20 N. E. R. 23. *Perpetual Lease.* In the prospectus of an apartment-house company, it was stated that the owner of a certain amount of stock was "entitled to a virtually perpetual lease of an apartment." The plaintiff subscribed to the requisite amount, and entered and improved the apartment. Held, that the owners could not expel him. Compton *v.* The Chelsea, 8 N. Y. Suppl. 622.

[1] 22 Pick. 401.

[2] Pattison *v.* Hull, 9 Cow. 747; Cleves *v.* Willoughby, 7 Hill, 83.

the land shall execute separate leases for each building to be erected, or, if one lease is to be executed for the entire lot, that it shall be so framed that the leasehold interest of the purchaser of one or more of the houses shall not be liable to reëntry for the non-payment of rent by the holder or holders of the other houses. In the absence of such a stipulation, if the owner in fee does not consent to an apportionment of the rents, all the leaseholds, whether held by different persons or not, will be liable to the ground-proprietor's claim. The usual plan in Maryland, and I believe elsewhere in the United States, is to divide the land into the desired number of building lots, each one being made independently subject to a given rental, and liable only to the aliquot part it represents of the whole.[1]

It is usual to provide in these agreements that the builder shall have power of entry only for the purpose of building, and that if he fails to complete his contract the owner of the fee may take possession of the buildings and complete the same;[2] but it is advisable to further provide that the agreement shall create a tenancy at will in order to entitle the landlord to the right to distrain.[3] It is also well to let the description of city lots run from the centre of the division wall of each other, so that there is no danger of overlapping, and the holders of the leaseholds will have a clear title

[1] In England it is considered the better plan to assign the lease to one purchaser, and he grants under-leases for the whole term, less one day, to other purchasers, reserving to himself the apportioned rents. Emden on Building, 78, citing 2 Davidson, pt. 1 (4th ed.), 421; Toleman *v.* Portbury, L. R. 5 Q. B. 288.

[2] Goodtitle *v.* Way, 1 T. R. 735.

[3] Walsh *v.* Lonsdale, L. R. 21 Ch. D. 9, 52 L. J. Ch. 2, 46 L. T. 858; Adams *v.* Hagger, L. R. 4 Q. B. D. 480.

to their severable interests in the party-walls. In fact, these agreements for leases should set out with the same particularity all the covenants intended to be included in the lease. A careful lawyer will never prepare an agreement simply reciting that the lease shall contain the "*usual covenants*," for what are the "usual covenants" is a doubtful question, dependent upon the circumstances of each particular case, the construction given by the court to the contract, and the customs of the locality.[1] For large buildings it will often be found desirable to annex a form of the lease to the agreement. In a recent English case,[2] where the tenant held possession of land under an agreement to lease, Jessel, M. R., said: "He holds under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice, as a tenant from year to year."

§ 90. Building Leases Dependent upon Contingen-

[1] Bennett *v.* Womack, 3 C. & P. 96, 98. "To rebuild the premises in case of fire" is not a usual covenant. Doe *v.* Sandham, 1 T. R. 705. Covenants in restraint of trade, or not to carry on a particular business, are not usual covenants. Bennett *v.* Womack, 3 C. & P. 96. But see Doe d. Marquis of Bute *v.* Guest, 15 M. & W. 160, 5 Davidson, pt. 1 (4th ed.) 1–16.

In an action to enforce an agreement in general terms to give a lease, it was held that in the covenant by the lessee to repair and leave in repair, damage by fire only excepted, the words "or other casualty" would not be added to the exception, as being too indefinite. Crosse *v.* Morgan, 60 L. T. 703.

[2] Walsh *v.* Lonsdale, L. R. 21 Ch. D. 9, 52 L. J. Ch. 2, 46 L. T. 858, 31 W. R. 109.

CIES. Sometimes agreements for leases expressly stipulate that the work of the builder shall be subject to the approval of the land-owner or his architect; in other words, a satisfactory performance of the builder's covenants is made a condition precedent to the execution of the lease.[1] In such cases substantial conformity with the plans and specifications will usually satisfy the condition without an exact compliance with minor and unimportant details.[2] A reference to the chapters referred to in the footnotes[3] will show upon what condition certificates of completion can justifiably be refused, and the general authority of the architect when the agreement constitutes him as sole judge;[4] so, also, as to time stipulations.[5]

Where the agreement for a lease is for several lots, and is made dependent upon the completion of the houses to be erected thereon, reserving a separate rent to the holder of the fee, the contract is generally con-

[1] See *ante*, Ch. III., on Approval by Architects and Others.

A covenant by the lessee to build was, with other covenants, made a condition precedent to a covenant by the lessor to renew the lease or pay for the building; the lessor subsequently released the lessee from the covenant to build. Held, that the erection of the building, with the performance of the other covenants, was still a condition precedent to the enforcement of the lessor's covenant to renew. McIntosh *v.* St. Philip's Church, 120 N. Y. 7, 23 N. E. R. 984.

The acceptance of rent by the lessor, after knowledge of the erection of a building not authorized by the lease, is not necessarily a waiver of the performance of a covenant to build a dwelling-house as a condition precedent to the renewal of the lease. Ibid.

An agreement to renew a lease will not be enforced where it is conditional on the lessee not sub-letting, and the lessee has in fact sub-let; and the receipt of rent since the breach, but in ignorance of it, is no waiver. McIntosh *v.* St. Philip's Church, 54 N. Y. Super. Ct. 291.

[2] See § 26 *et seq.* and cases there cited; also, Hollis *v.* Whiting, 1 Vern. 151; Jackson *v.* Pierce, 2 Johns. 226.

[3] *Ante*, Ch. II., III., IV.

[4] *Ante*, Ch. II. § 12; Ch. III. § 17.

[5] *Ante*, Ch. V.

strued as meaning that the builder is to have a lease for each house as it is completed, and not that he must complete all the houses before he can obtain any leases. If the contrary construction were adopted as to the divisibility of these agreements, builders would frequently be compelled to abandon work, owing to lack of funds arising from inability to dispose of the houses as completed.[1]

There is a common practice in England of stipulating, in these agreements for building leases, that the leases are to be given either to the lessee or to persons named by him. In such case the appointment of a nominee is a condition precedent to the execution of the lease.[2]

[1] Wilkinson *v.* Clements, L. R. 8 C. H. Ap. 96, 42 L. J. Ch. 38.
[2] Williams *v.* Brisco, L. R. 22 Ch. D. 441, 48 L. T. 198, 31 W. R. 907.

CHAPTER XIV.

SPECIFIC PERFORMANCE OF LEASES AND AGREEMENTS FOR LEASES.[1]

§ 91. PAROL AGREEMENTS AND LEASES. Notwithstanding the fact that a verbal contract for a lease fails to satisfy the requirements of the Statute of Frauds,[2] it may still be enforced in courts of equity when there has been a part performance of it.[3] What constitutes a sufficient part performance to justify the application of the principle that it will be a fraud upon the opposite party not to complete the contract,[4] depends upon circumstances. The fact that a contract has been partly performed, and the parties cannot be restored to their original position, is the basis upon which courts, exercising their own discretion, may decree specific performance, when, if it had not been acted upon, they would refuse to enforce it.[5]

§ 92. EFFECT OF POSSESSION. The taking possession of land by the consent of the owner, and making improvements upon it, will generally be construed as sufficient part performance to warrant the admission in equity of evidence of a parol contract,[6] and to decree specific per-

[1] See *ante*, Ch. VI., on Specific Performance of Building Contracts.

[2] See *ante*, § 86.

[3] Hollis *v.* Whiting, 1 Vern. 151; Walker *v.* Walker, 2 Atk. 98; Jackson *v.* Pierce, 2 Johns. 226.

[4] McCray *v.* McCray, 30 Barb. (N. Y.) 633; Dickerson *v.* Crisman, 28 Mo. 134; Godfrey, Adm'r *v.* Dwinell, 40 Me. 94.

[5] Price *v.* Corporation of Penzance, 4 Hare, 506; South Wales Ry. Co. *v.* Wythes, 1 K. & J. 200.

[6] 9 Wis. 79; 5 R. I. 149; 8 Mich. 463; 30 Vt. 516; 10 Cal. 156; Wills

formance if necessary. Indeed, bare delivery of possession under an agreement to lease has been deemed a part performance;[1] but if the tenant, after entering with the privity of the landlord, makes substantial improvements, and expends any considerable sum of money in building, the court will be bound to consider extrinsic evidence of a verbal agreement.[2] The court interferes to prevent injustice being done by the landlord refusing to give a lease after allowing his tenant to expend money upon improving land in which he could have no other interest than the promised lease.[3]

§ 93. Possession after Expiration of a Former Lease. It does not affect the construction of possession as a part performance of an agreement, whether it is gained at the time of the alleged contract, or is evidenced by a tenant holding over after the expiration of his original lease.[4] Where such retention

v. Stradling, 3 Ves. 378. Where the lessee had entered and made improvements under a lease complete in form except that it had not been acknowledged, the court refused to allow an ejection by an assignee of the lessor taking with knowledge of the facts. McGlauflin *v.* Holman, 1 Wash. St. 239, 24 Pac. R. 439.

[1] Parker *v.* Taswell, 2 De G. & J. 559.

[2] Lester *v.* Foxcraft, Colles Parl. Cas. 108; Carter *v.* Boehn, 3 Burr. 1919; Mundy *v.* Joliffe, 5 Myl. & C. 167; Wallace *v.* Scoggins, 18 Or. 502.

[3] Williams *v.* Evans, L. R. 19 Eq. 547, 44 L. J. Ch. 319 (outlay by subtenant); and Frames *v.* Dawson, 14 Ves. 386.

[4] In Morrison *v.* Herrick, 130 Ill. 631, 22 N. E. R. 537, lessees under a one-year written lease, who had agreed orally with the lessor for a five-year lease, and had held possession after the expiration of the year, and had made improvements, were granted performance of the contract to give a lease, the part performance being sufficient to take the case out of the statute. Possession and the making of improvements under an oral agreement to renew, and after the expiration of the original lease, are enough to operate as notice against the holder of a written lease who has paid no value. Morrison *v.* Herrick, 130 Ill. 631, 22 N. E. R. 537. But where the lessor of a building promised verbally to renew the existing lease at its expiration, if the plaintiff would purchase the unexpired term and the fixtures, the purchase and entry into possession were held not to

of possession can only be accounted for by an agreement to renew the lease, it will be construed as a part performance thereof;[1] particularly where, by virtue of the parol agreement, the lessee holding over agrees to an increase of rent or other change of stipulations.[2] An illustration of the above rule is found in the leading case of *Pain* v. *Coombs*, where a verbal contract was made for a lease, and the solicitor, acting for both parties, was ordered to draw up a written agreement. After the solicitor had prepared a rough draft of the terms and conditions, he explained the same to the lessor, who thereupon gave the lessee possession, and ordered the solicitor to complete his draft. He afterwards refused to execute the agreement, and gave the lessee notice to vacate the premises. The lessee brought an action on the unwritten contract, and the court held that possession under such circumstances constituted part performance, and thereupon decreed enforcement *in specie*.[3] It may be stated, as a general rule, that the court will specifically enforce an agreement to lease, or direct the renewal of an unexpired lease, if the tenant is in possession and there is a portion of the time still to run.[4] So, also, even if the time agreed upon is expired, but there is sufficient reason for renewal arising from the fact that defendant has acted upon the new agreement.[5] So, wherever a verbal agreement is made

constitute such part performance as would take the agreement out of the statute. Koch *v.* Building Assoc. (Ill.), 27 N. E. R. 530.

[1] Rankin *v.* Simpson, 19 Pa. St. 471.

[2] Spear *v.* Olendorf, 26 Md. 37; Switzer *v.* Gardner, 41 Mich. 164 (specific performance granted of a lease which had expired by substitution of new one, third parties becoming interested).

[3] Pain *v.* Coombs, 1 De G. & J. 34.

[4] Parsons on Contracts, 523; Furnivall *v.* Crew, 3 Atk. 83; Carr *v.* Ellison, 20 Wend. 178.

[5] Wilkinson *v.* Torkington, 2 Younge & C. Ex. 726.

by a landlord with his tenant to grant a renewal of the lease after the expiration of the original lease, and the holding over can reasonably be referred to the supplemental verbal agreement, or not reasonably accounted for on any other supposition, such holding over will be a part performance.[1] The payment of an increased rate of rent is further evidence of the part performance of a verbal agreement.[2]

§ 94. Acting upon a Verbal Agreement by Making Improvements. It is, further, well settled that if a builder, after a parol promise from the owner of land to let him have the use thereof for a certain period, or even if the landlord gives only an implied promise by allowing and encouraging the man to erect valuable improvements, and the builder accordingly, upon faith in such express or implied promise, with the assent or knowledge of the landlord, expends money upon the land, the court will decree specific performance.[3] Illustrations of this are to be found in several cases where tenants have, upon encouragement or silent acquiescence on the part of the landlord, while laboring under an erroneous supposition, erected and repaired buildings on the land, and courts of equity have declined to allow the landlord to take advantage of such improvements.[4]

The following rules were laid down in a leading

[1] Pain *v.* Coombs, 1 De G. & J. 34; Dowell *v.* Dew, 1 Y. & C. C. C. 345; Blunt *v.* Tomlin, 27 Ill. 93; Holmes *v.* Holmes, 44 Ill. 168; Spear *v.* Olendorf, 26 Md. 37.

[2] Wills *v.* Stradling, 3 Ves. 378; Nunn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. (N. S.) 868; Wiles *v.* Fox, 1 Rand. 165.

[3] Lester *v.* Foxcraft, Colles Parl. Cas. 108; Carter *v.* Boehn, 3 Burr. 1919; Hollis *v.* Whiting, 1 Vern. 151.

[4] Frames *v.* Dawson, 14 Ves. 386; Williams *v.* Lynch, 2 Sch. & Lef. 1; Carter *v.* Boehn, 3 Burr. 1919; Jackson *v.* Pierce, 2 Johns. 221.

English case,[1] and concisely express the law upon this subject: —

1. If a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and the buildings when the tenancy has determined.[2]

2. If the tenant, being a mere tenant at will, builds on the land in belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, equity will interfere to compel the grant of a lease.[3]

3. If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land.

4. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all expenditure on it.[4]

§ 95. Other rules may be added to the above as follows: —

5. Where a *purchaser*, after part payment of the

[1] Ramsden *v.* Dyson, L. 1 H. L. 129, as cited by Emden on Building, 90. See, also, Bankart *v.* Tennant, L. R. 10 Eq. 141, 39 L. J. Ch. 809; Willmott *v.* Barber, L. R. 15 Ch. D. 96; Baldwin *v.* Reed, 16 Conn. 67.

[2] Curtis *v.* Hoyt, 19 Conn. 165.

[3] Frames *v.* Dawson, 14 Ves. 386; Lindsay *v.* Lynch, 2 Sch. & Lef. 1.

[4] See, also, Curtis *v.* Hoyt, 19 Conn. 165; Frank *v.* Brand, 16 Conn. 272; Baldwin *v.* Reed, 16 Conn. 67; Rennie *v.* Young, 2 De G. & J. 136; Crampton *v.* Varna Ry. Co., L. R. 7 Ch. Ap. 562.

purchase-money, has entered and made improvements upon lands, and the owner sets up the fact that the agreement to purchase was not in writing and therefore void under the statute, the purchaser may recover in equity the value of the improvements.[1]

6. Where repairs or improvements are necessary to the proper enjoyment of the leasehold, the court may decree specific performance.[2] So, also, if the interest of the tenant will be permanently injured if the repairs are not made.[3]

7. Where the landlord does not know that the tenant is making repairs upon faith of a lease to be secured, or has given him encouragement in that direction, an action for specific performance cannot be maintained.[4] This is corollary to the general doctrine that no contract can be specifically enforced other than such as is binding at law,[5] complying with the Statute of Frauds, or sufficiently performed in part to take it out of the statute,[6] and having all the essentials to make it binding as to consideration, legality of purpose, etc.

8. At law, upon the failure of the owner to comply with his *written* agreement for a written lease, the proposed lessee can recover as damages all expenses incurred in preparing to remove to, or in occupying, the premises, together with the difference between the

[1] 1 Jones Eq. N. C. 302, 339; 14 Tex. 331; 1 Dev. & B. Eq. No. C. 9. Payment of part, or even the whole, of the purchase-money is not of itself sufficient part performance to take the case from the operation of the statute. 14 Tex. 373; 22 Ill. 643; 4 Kent Com. 451.

[2] Lane *v.* Newdigate, 10 Ves. 192 (canal and arch for lessee).

[3] Vallotin *v.* Seignett, 2 Abb. Pr. 121.

[4] Willmott *v.* Barber, L. R. 15 Ch. D. 96.

[5] 33 Ala. N. S. 449.

[6] Ramsden *v.* Dyson, L. R. 1 H. L. 129.

real value of the lease and the contract price.[1] But in equity, although the agreement to lease may not have been in writing, if there has been a part performance the plaintiff may also recover the amount he has expended upon the land.[2]

§ 96. LACHES. The maxim that he who seeks equity must do equity is applicable to all cases wherein specific performance is sought. Accordingly the plaintiff must not only show that his claim is equitable in all respects, and that the contract is fair, but that his own conduct has been proper,[3] for if he has been guilty of laches the court will refuse his petition.[4] So, where the tenant makes false representations as to buildings or other improvements upon neighboring lands, or as to his object in leasing the property and the purposes to which he intends to put it, which influence the lessor in making the agreement, the court will not decree a lease.[5] So, again, where the party seeking performance is not able to perform his part of the contract, the court will not compel the giving or acceptance of a lease.[6] In all cases a plaintiff is expected to exercise due diligence in enforcing his claim, for, an application of this kind being addressed to the discretion of the court, specific enforcement will not be entertained in favor of one who has long slept upon his rights.[7] So, in a case where the agreement for a lease had been entered into a long

[1] Ward *v.* Smith, 11 Price, 19; Duggs *v.* Dwight, 17 Wend. 71.

[2] Pulbrook *v.* Lawes, L. R. 1 Q. B. D. 284, 45 L. J. Q. B. 178, 34 L. T. 95.

[3] Flood *v.* Finlay, 2 Ball & B. 16, 1 Sim. 111; Plumber *v.* Keppler, 26 N. J. Eq. 489.

[4] Garrett *v.* Besborough, 2 Dru. & Walsh, 441; Gibson *v.* Goldsmid, 5 De G., M. & G. 757, 24 L. J. Ch. 279.

[5] Myers *v.* Watson, 1 Sim. N. S. 523; Peacock *v.* Penson, 11 Beav. 355; Piggott *v.* Stratton, 1 De G., F. & J. 33.

[6] Fildes *v.* Hooker, 2 Mer. 424, 3 Madd. 193.

[7] Hudson *v.* Bartram, 3 Madd. 440; McDermott *v.* McGregor, 21 Minn. 17.

time before, the court refused to decree a lease because some of the covenants of the contract had been broken by the plaintiff.[1] So, where a period of twelve years elapsed after the expiration of a lease for ninety-nine years, renewable forever, before the enforcement of a renewal was sought, and the tenant had set up an adverse title, the claim of the original owner of the fee to renewal was denied.[2]

It may, therefore, be stated, as a general rule, that courts of equity will not decree specific performance of an agreement for a lease when one or more of the conditions have been broken by the intended lessee.[3]

§ 97. FORFEITURE. Specific performance will not be decreed when it will effect a forfeiture. So, where a lessor was unable to comply with the terms of his lease, as to the construction of certain roadways, without forfeiting the lease, the court declined to give specific enforcement.[4] So, where a lessee covenanted to repair after notice, and the lessor, having given notice, afterwards waived the default of the lessee by continuing negotiations, the court relieved the forfeiture.[5] So, also, where the performance will cause a breach of a prior agreement with another person.[6] The court will not, however, permit a defendant to purposely put himself in such a position that his performance will create a forfeiture.[7]

[1] Gregory *v.* Wilson, 9 Hare, 683, 10 Eng. L. & Eq. 133; Moxhay *v.* Inderwick, 1 De G. & J. 708.

[2] Myers *v.* Silljacks, 58 Ind. 319.

[3] Jones *v.* Jones, 12 Ves. 188; Lille *v.* Leigh, 3 De G. & Jones, 204; Pomeroy on Spec. Perf. of Contracts, 355, 356.

[4] Peacock *v.* Penson, 11 Beav. 355; Willmott *v.* Barber, L. R. 15 Ch. D. 96.

[5] Hughes *v.* Metropolitan Ry., 46 L. J. C. 583.

[6] Willmott *v.* Barber, L. R. 15 Ch. D. 96.

[7] Helling *v.* Lumley, 3 De G. & J. 493, 28 L. J. Ch. 249.

§ 98. Bankruptcy of Builder. The bankruptcy or insolvency of a builder is a weighty objection to granting specific enforcement of an agreement to lease property to him.[1]

§ 99. Indefinite Agreements. We have already seen[2] that specific performance of contracts will be decreed in those cases only where the character of the work to be done is definitely stated.[3] So where the agreement was to take a lease of a house when it "should be put in thorough repair, and the drawing-room handsomely decorated according to the present style," the court considered this statement to be too indefinite to warrant a decree for specific performance.[4] Again, in determining whether a written instrument was intended as an agreement for a lease or for a present demise, the court will not enforce either if the intention of the parties is indefinite, or the conditions cannot readily be inferred.[5] The same is also held where uncertainty exists.[6] On the other hand, it was held, in a case where the lessor agreed to put the house "in substantial and decorative repair," the court decreed specific performance, with an inquiry as to whether the repairs had been properly executed; and if not, then

[1] Buckland *v.* Hall, 8 Ves. 92; Price *v.* Ashton, 1 Young & C. Ex. 444; Neale *v.* Mackensie, 1 Keene, 474. See *ante*, § 71.

[2] *Ante*, Ch. VI.

[3] Stuyvesant *v.* Mayor of New York, 11 Paige Ch. 414; Story Eq. Jur. § 728. In Rutan *v.* Crawford, 45 N. J. Eq. 94, 16 Atl. R. 180, specific performance of a contract to lease was refused, although the lessee had made improvements, the facts showing uncertainty as to the nature of the tenancy and the consideration to be given.

[4] Taylor *v.* Portington, 7 De G., M. & G. 328. See, also, Myers *v.* Forbes, 24 Md. 298; Lancaster *v.* De Trafford, 31 L. J. Ch. 554.

[5] Femes *v.* Hepburn, 2 Y. & C. 158; Gordon *v.* Trevely, 1 Price, 64.

[6] But see Hodges *v.* Horsfall, 1 Russ. & M. 116; Clinan *v.* Cook, 1 Sch. & L. 33.

as to damages.[1] But the weight of authority is otherwise. For instance, where an agreement stipulated that a lease would be given as soon as the lessee built a house of certain value, "according to a plan submitted to and approved by the lessor," specific performance was refused.[2] Where, however, the lessor was to have the house "complete, finished, and fit for occupation," and the proposed lessee took possession, but found faults which were declared by an expert to be immaterial, he was compelled to take the lease.[3]

If the building plans or specifications are subject to approval of architects or others, or if arbitrators fail to agree as to details, specific performance will not be decreed.[4]

An agreement to spend a certain amount of money in building, as a condition precedent to the acceptance of a lease, will not be specifically enforced.[5] Nor will a preliminary agreement when the intention of a more formal one is evident.[6]

For the same reason, that is, indefiniteness, and the fact that adequate remedy is to be had by an award of damages, courts seldom decree specific performance of agreements to make repairs.[7] So where a covenant in a lease of a gravel-pit guaranteed to make good the ground at the end of the term, specific performance was refused.[8]

[1] Samuda *v.* Lawford, 4 Giff. 42, 8 Jur. N. S. 739.

[2] Brace *v.* Wenhert, 25 Beav. 348.

[3] Faulkner *v.* Llewellin, 11 W. R. 1055, 12 W. R. 193; Parker *v.* Taswell, 2 De G. & J. 559.

[4] Tillett *v.* Charing Cross Bridge Co., 26 Beav. 419; Brace *v.* Wenhert, 25 Beav. 348.

[5] Mosely *v.* Virgin, 3 Ves. 185.

[6] Wood *v.* Silcock, 50 L. T. 251, 32 W. R. 845.

[7] City of London *v.* Nash, 3 Atk. 512; Lord Abinger *v.* Ashton, L. R. 17 Eq. 358.

[8] Flint *v.* Brandon, 8 Ves. 159.

§ 100. INCIDENTAL STIPULATIONS. It is important to distinguish those cases where, for general uncertainty of statement, the court cannot exact performance *in specie*, and those in which the enforcement is necessary in order to give the injured party a remedy upon the breach of the other covenants. Equity will interfere in the latter instances when it is clear that the law affords no adequate remedy. If, therefore, a preliminary agreement is merely incident to a lease for which specific performance is required in order to sue upon the lease, equity will decree a lease.[1] Thus the execution of a lease to contain covenants to build, according to an agreement to that effect, will be decreed so as to give the lessor a remedy upon the covenants.[2] The rule seems to be, that equity will enforce a covenant to make improvements only when there is no other adequate relief.[3] Where an agreement was to execute a building lease that the lessor might erect certain buildings, the court decreed the lease and directed inquiry as to damages.[4]

§ 101. OTHER INSTANCES OF SPECIFIC ENFORCEMENT. Where the plaintiff had assigned a lease to the defendant upon faith in his agreement to pay the plaintiff an annuity, and furnish him a house worth £10 a year to live in, although the objection was raised that the plaintiff had rescinded the contract, specific perform-

[1] Kay *v.* Johnson, 2 H. & M. 118; Middleton *v.* Greenwood, 2 De G., J. & Sm. 142.

[2] City of London *v.* Southgate, 38 L. J. C. 141; Paxton *v.* Newton, 2 Sm. & G. 437.

[3] Stuyvesant *v.* Mayor etc., 11 Paige, 414.

[4] Middleton *v.* Greenwood, 2 De G., J. & Sm. 142; Soames *v.* Edge, 1 Johns. 669. A contract to lease a building cannot be enforced while the building is still in process of erection and unfinished. Friedman *v.* McAdory, 84 Ala. 264, 4 So. R. 835.

ance was decreed.[1] Again, where a lessor broke off negotiations with other parties, and allowed the lessee to take possession of land upon a promise to execute a formal lease, which was not complied with, specific performance was compelled two years afterwards.[2] Where a tenant built upon his own land instead of that of his landlord, performance *in specie* was enforced.[3] So, where a land-owner agreed to lease a certain number of lots as the houses to be erected upon them should be advanced to a certain stage, specific performance was decreed for the assignee of the builder when he had completed some of the houses, although he disclaimed the other lots.[4] In a Michigan case[5] specific performance was granted of a lease which had expired by substitution of a new lease, as third parties had acquired an interest.

§ 102. Agreements to Insure. Equity will specifically enforce agreements on part of either lessor or lessee to insure.[6] If a loss is occasioned by the failure of the defendant to insure as agreed upon, the equity court will not compel the plaintiff to resort to an action at law, but will decree payment.[7]

[1] Clifford *v.* Turrell, 1 Younge & Collyer Ch. 138, 150.
[2] Seaman *v.* Aschermann, 51 Wis. 672.
[3] Pembroke *v.* Thorpe, 3 Swanst. 437.
[4] Wilkinson *v.* Clements, L. R. 8 Ch. 96.
[5] Switzer *v.* Gardner, 41 Mich. 164.
[6] Mead *v.* Davidson, 3 Ad. & El. 303; Perkins *v.* Washington Ins. Co., 4 Cow. 645, 23 Wend. 18.
[7] Taylor *v.* Merchants' Ins. Co., 9 How. U. S. 405, and cases just cited.

CHAPTER XV.

CAPACITY OF PARTIES TO LEASES.

§ 103. GENERALLY. It may be stated generally that the same rules apply, with respect to the capacity of parties to leases, as in other cases of contract.[1] Therefore all persons who are seised or possessed of lands or tenements may grant building or other leases subject to such terms and restrictions, and for any period commensurate with their respective interests, excepting those who are under legal disabilities which render them incapable of making contracts.[2] It is important, however, to bear in mind that the lessor of land should be in possession thereof at the time of making the lease, or have an unqualified and undisputed right to possession; for every grant of land by common law was void if, at the time of its delivery, the land was in the actual possession of a person claiming under an adverse title. Statute has changed this in most States. The presumption of title arises from mere possession, and he who holds the freehold has at least the presumptive right of leasing it to whomsoever he pleases; and without such possession the owner cannot grant a valid lease.[3] Even if a person has acquired a wrongful possession of land, he will be thereby enabled to make a lease which can only be avoided by eviction.[4] Strictly speaking, a tenant is never in possession of the lands

[1] 1 Washb. Real Property, 301.

[2] Price *v.* Pierce, 36 Me. 148.

[3] Crary *v.* Goodman, 22 N. Y. 170. A bare right of entry will not be sufficient. Iseham *v.* Morrice, Cro. Car. 109.

[4] Bacon's Abr., Leases, 4; Lee *v.* Norris, Cro. El. 331.

leased to him, for by virtue of his lease he has acquired a right of entry, but is possessed, not of the lands, but of a term for a fixed duration, while the seisin of the freehold remains in the lessor; that is to say, the tenant's possession is the possession of his landlord.[1] A lessee, therefore, has no estate in the land until he has entered upon the premises, nor will his deed operate before entry.[2] Yet he has upon delivery of the lease an *interesse termini*, by virtue of which the land is awarded to him for a certain term,[3] and he may make an assignment of the whole or part of his term before he enters;[4] and if he die in the interim, his heirs or executors may make an entry in his stead.[5] But neither he nor his heir can maintain trespass *quare clausum fregit* against a stranger who has entered the land before he has taken possession.[6] The possession need not be actual, for it is sufficient if the lessor have a clear and undisputed right to possession at the time of making the lease.[7]

§ 104. INFANTS. Eminent authority could be cited as declaring contracts made by minors to be absolutely void, but the question is nevertheless well settled that they are voidable only.[8] So that, although a minor

[1] 1 Washb. Real Property, 291, citing 1 Cruise Dig. 224, Lit. § 59.

[2] Doe *v.* Watts, 9 East, 19.

[3] Lit. § 58; Doe *v.* Walker, 5 B. & C. 111; 1 Cruise Dig. 225.

[4] Plowden, 133–142; Co. Lit. 46 b.

[5] Co. Lit. 46 b.; Shep. Touch. 269.

[6] Shep. Touch. 269; Bacon's Abr., Leases, 4; Smith, Land. and Ten. 13. The possession of a tenant for life is not adverse to that of the owner of the remainder. Grout *v.* Townsend, 2 Hill, 554; Doe *v.* Brown, 2 Ellis & B. 331.

[7] Russell *v.* Doty, 4 Cow. 576; Billingham *v.* Alsop, Cro. Jac. 52, 1 Hill Real Property, 47.

[8] Jackson *v.* Carpenter, 11 Johns. 539; Drake *v.* Ramsay, 5 Ohio, 251; Bool *v.* Mix, 17 Wend. 131, Co. Lit. 308 a; Worcester *v.* Eaton, 13 Mass. 371.

cannot make a lease that will be absolutely binding upon him after he becomes of age,[1] he can create leases which require some positive act upon his part, at his majority, to disaffirm them.[2] Yet he will be given a reasonable time to avoid the lease.[3] If the lease was verbally made, and is ratified by the infant, on coming of age, by some slight circumstance,[4] as receiving rent, or even by inaction, he cannot afterwards avoid it.[5] No particular mode of disaffirming leases made by minors can be laid down as applicable to all cases, as each depends upon the original contract; yet, while no distinct act of confirmation is necessary, all voidable contracts of an infant will be binding upon him unless expressly disaffirmed.[6] As this disaffirmance cannot be given until he becomes of legal age, it happens that, as he cannot avoid leases created by him until he has reached that age,[7] if the lessee has taken possession he can retain it until that time.[8] He can avoid the lease at the proper age by reëntry,[9] and sometimes by a deed without a formal entry to regain possession.[10] Simply executing another lease is not a disaffirmance unless so

[1] Roberts *v.* Wiggins, 1 N. H. 74; Roof *v.* Stafford, 7 Cow. 179; Jackson *v.* Carpenter, 11 Johns. 539.

[2] Richardson *v.* Boright, 9 Vt. 368; Cheshire *v.* Barrett, 4 McCord, 241.

[3] Zouch *v.* Parsons, 3 Burr. 1806; Goodsell *v.* Myers, 3 Wend. 479.

[4] Houser *v.* Reynolds, 1 Hayw. 143.

[5] Smith *v.* Low, 1 Atk. 489; Brown *v.* Caldwell, 10 S. & R. 114; Warwick *v.* Bruce, 2 M. & S. 205.

[6] Cheshire *v.* Barrett, 4 McCord, 241; Richardson *v.* Boright, 9 Vt. 368.

[7] Slator etc. *v.* Trimble etc., 14 Ir. C. L. 343; Robson *v.* Flight, 4 De G., J. & S. 608.

[8] Roof *v.* Stafford, 7 Cow. 179.

[9] Worcester *v.* Eaton, 13 Mass. 371; Whitney *v.* Dutch, 14 Mass. 463; Murray *v.* Shanklin, 4 Dev. & Bat. 289; Bool *v.* Mix, 17 Wend. 133.

[10] Cresinger *v.* Welch, 15 Ohio, 192; Jackson *v.* Carpenter, 11 Johns. 539.

inconsistent with the prior deed that both cannot stand together.[1] Bringing an action of ejectment amounts to a disaffirmance;[2] so does a formal demand.[3]

As to time allowed an infant to avoid a lease, it has been held in several cases that he may do so at any time after arriving at age within the period of limitation for reëntry;[4] but other courts have held that it must be done within a reasonable time after arriving of age;[5] and others still hold that no distinct act is necessary, as there must be confirmation,[6] but the slightest acts may amount to a confirmation, as said before.[7]

On the other hand, an infant lessee may retain an estate so long as he desires to do so, while he can avoid it at any reasonable time; but a "reasonable time" will not be considered to be a considerable time after he has reached his majority; and therefore, if he fails to revoke the lease promptly, it will be presumed that he has waived his privilege, and he will thenceforth be bound by the terms of the original lease.[8]

The right to disaffirm a lease is a personal one, and cannot be exercised by any other than the lessor;[9] therefore a guardian cannot avoid the contracts or leases of his ward.[10]

§ 105. LUNATICS. The lease of a lunatic is void so

[1] Eagle Ins. Co. *v.* Lent, 6 Paige, 635.
[2] Slator *v.* Brady, 14 Ir. C. L. 61.
[3] Ibid.
[4] Drake *v.* Ramsay, 5 Ohio, 251.
[5] Richardson *v.* Boright, 9 Vt. 368; Hoit *v.* Underhill, 9 N. H. 436.
[6] Wheaton *v.* East, 5 Yerg. 62, 2 Kent Com. 239 n.; Thompson *v.* Lay, 4 Pick. 48.
[7] Wheaton *v.* East, 5 Yerg. 62.
[8] Kline *v.* Bebee, 6 Conn. 494.
[9] 1 Platt on Leases, 32; Worcester *v.* Eaton, 13 Mass. 371; 5 Yerg. 61.
[10] Hoyle *v.* Stowe, 2 Dev. & B. 328.

long as it is executory;[1] but some doubt is entertained in England as to this if the lease has been executed, possession acquired, and the unsoundness of mind was not known to the lessor.[2] In this country, however, it seems definitely settled that a person *non compos mentis* can avoid any and all of his contracts, and consequently his leases.[3] A distinction has been attempted by laying down a rule that the deed of an idiot or a lunatic is void when he is under guardianship, and voidable only when he is not.[4] Mere deficiency of understanding, illiteracy, or even weakness of mind, is not generally sufficient ground for avoiding a contract, unless undue influence, fraud, or gross misrepresentation has induced the party to sign.[5] A lease may always be avoided for fraud, provided, however, that it is rescinded promptly, for delay may affirm the contract;[6] so, also, if obtained by duress.[7] For instance, if an uneducated person is made to sign a deed by gross misrepresentations as to the character of its contents, the deed is fraudulent, and therefore void.[8] Any one who has been deaf, dumb, and blind from birth is incompetent to execute

[1] 1 Story Eq. Jur. § 222; Johnson *v.* Moore, 1 Litt. 371; 1 Washb. Real Property, 30; Estate of Desilver, 5 Rawle, 111; Seaver *v.* Phelps, 11 Pick. 304.

[2] Smith, Land. and Ten. 47 n.; Beavan *v.* McDonnell, 9 Exch. 909; Dane *v.* Kirkwall, 8 Car. & P. 679. On this point, see Imperial Loan Co. *v.* Stone, 1891, 1 Q. B. (C. A.) 599; article in 92 Law Times, 198.

[3] Bensell *v.* Chancellor, 5 Whart. 371; Grant *v.* Thompson, 4 Conn. 203; Lang *v.* Whidden, 2 N. H. 435; Rice *v.* Peel, 15 Johns. 503; Fitzgerald *v.* Reed, 9 S. & M. 94.

[4] Wait *v.* Maxwell, 5 Pick. 217; Webster *v.* Woodford, 3 Day, 90.

[5] Dodd *v.* Wilson, Const. 448; Odell *v.* Buck, 21 Wend. 142; Sprague *v.* Dull, 11 Paige, 480.

[6] McCarty *v.* Ely, 4 E. D. Smith, 375.

[7] 1 Platt on Leases, 47; Worcester *v.* Eaton, 13 Mass. 371.

[8] Jackson *v.* Hayner, 12 Johns. 469 (but not if it was read to him); Hallenbeck *v.* Dewitt, 2 Johns. 404.

a lease,[1] but not if simply deaf and dumb, if he can understand by signs.[2] Old age does not necessarily imply incapacity.[3]

§ 106. DRUNKARDS. He who is made to execute a lease while so intoxicated as not to understand what he is doing, may avoid it.[4] Some courts hold contracts made by persons so drunk as to be devoid of reason to be absolutely void;[5] while other courts regard such contracts as voidable only, *i. e.* capable of being ratified when sober.[6] It may be added that proof of partial intoxication will not suffice; the party seeking to avoid a lease must show that he was so thoroughly under the influence of liquor as to be incapable of understanding.[7]

The practice is to permit the party, if defendant, to show in evidence, under a plea of *non est factum*, that he was induced or forced to sign the deed while so helplessly drunk as not to understand the nature of his act.[8]

§ 107. MARRIED WOMEN. A lease by a *feme covert* is void, unless her husband joins therein, excepting where under statute she is allowed to act as a *feme sole* over her sole and separate property.[9] On the other hand, as the husband is entitled to her rents, etc., at common law, he can, independently of her consent, execute

[1] Manser's Case, 2 Co. 3 a; Brown *v.* Brown, 3 Conn. 299.

[2] Shuter's Case, 12 Co. 90; Brown *v.* Brown, 3 Conn. 299.

[3] Lewis *v.* Bead, 1 Ves. 19; Waters *v.* Barrol, 2 Bush, 598.

[4] Fenton *v.* Holloway, 1 Stark. 126; Gore *v.* Gibson, 13 M. & W. 623; Prentice *v.* Achorn, 2 Paige, 30.

[5] See authorities just cited.

[6] Eaton *v.* Perry, 20 Mo. 96; Arnold *v.* Hickman, 6 Munf. 15; Renicker *v.* Smith, 2 Har. & J. 421.

[7] Johns *v.* Fritchey *et al.*, 39 Md. 258.

[8] Cole *v.* Robbins, Bul. N. P. 172; Fenton *v.* Holloway, 1 Stark. 126.

[9] Smith, Land. and Ten. 482; 1 Platt on Leases, 48; Fowler *v.* Shearer, 7 Mass. 14; Murray *v.* Emmons, 19 N. H. 483.

leases of her property which will be binding during coverture.[1]

It should be borne in mind, however, that, while a lease made by husband and wife jointly will stand after coverture,[2] if the lease is executed by the husband alone it will not necessarily stand throughout their joint lives, for upon his death she can affirm or avoid it.[3] It seems, however, that very slight acts upon her part, such as receiving rents after her husband's death,[4] will be sufficient to affirm leases made by him; yet this will hardly be true of a verbal lease, or of a written lease of which she knew nothing, when her consent is necessary at the commencement of the term.[5] Where a wife's deed was signed by her husband and followed by her separate acknowledgment, the court held that the wife's estate could pass thereby.[6] The law of husband and wife has been considerably modified by legislative enactment in the various States; and the common-law doctrine of the incapacity of married women is becoming less potent, particularly with respect to a wife's power to control her sole and separate estate.

§ 108. GUARDIANS AND COMMITTEES. It may be generally stated that a guardian of a minor may lease his lands.[7] And the guardian or committee of a lunatic

[1] 1 Washb. Real Property, 304; 1 Platt on Leases, 138; Williams, Real Property, 336; Doe v. Weller, 7 T. R. 478.

[2] Arnold v. Revoult, 1 Brod. & B. 443; Brett v. Cumberland, Cro. Jac. 399.

[3] Doe v. Weller, 7 T. R. 478; Jackson v. Holloway, 7 Johns. 81; Marquat v. Marquat, 12 N. Y. 336; Dixon v. Harrison, Vaugh. 46; Williams, Real Property, 336.

[4] Worthington v. Young, 6 Ohio, 313; Trout v. McDonald, 88 Pa. St. 144; Wotton v. Hele, 2 Saund. 180.

[5] Turney v. Sturges, Dyer, 91 a; Jackson v. Holloway, 7 Johns. 81.

[6] Fowler v. Shearer, 7 Mass. 14; Gordon v. Haywood, 2 N. H. 402.

[7] 2 Kent Com. 228; King v. Oakley, 10 East, 494; Palmer v. Chesseboro, 55 Conn. 114, 10 Atl. R. 508.

usually has similar authority, subject, however, to the direction of the court; but this power must expressly be given to the court by statutory provision, for at common law the representative of a person *non compos mentis* would have no such power.[1] In neither case, *i. e.* whether the ward is a minor or a lunatic, can the guardian create a lease for a longer term than that for which he is appointed; for if the lunatic gains his sanity, or the minor becomes of age, either can avoid the remainder of the term yet to run.[2]

§ 109. FOREGOING AS LESSEES. What has been said above concerning leases created by minors, lunatics, and married women is directed chiefly to their incapacity as lessors; when we consider them as lessees we find far fewer limitations. The reason is that holding land is a running beneficial interest. To all intents and purposes, any one may be a lessee, although not capable of making a valid contract; but of course, while simply taking possession of lands and tenements will render him a lessee, he will not thereby be bound by peculiar covenants.[3] A minor, etc., cannot become a lessee by virtue of an agreement or contract unaccompanied by a taking of possession. The doctrine that lunatics and drunkards,[4] minors,[5] and married women[6] may become lessees, is well settled.

[1] Kruppe *v.* Palmer, 2 Wils. 130; Griswold *v.* Miller, 15 Barb. 520.

[2] 1 Washb. Real Property, 304; 1 Platt on Leases, 380; Smith's Abr., Leases, 19. But a slight act on the part of the minor after he becomes of age will affirm a lease made by his guardian. Van Doren *v.* Everett, 2 South. 469; Ross *v.* Gill, 4 Call, 250, holding four months' affirmance; Holmes *v.* Blogg, 8 Taunt. 35.

[3] See 1 Washb. Real Property, 306.

[4] Co. Lit. 2 b; 1 Platt on Leases, 530.

[5] Lowe *v.* Griffith, 1 Scott, 460; Kline *v.* Beebe, 6 Conn. 494; 1 Washb. Real Property, 306.

[6] Co. Lit. 3 b; 1 Platt on Leases, 531; 1 Washb. Real Property, 306.

§ 110. Administrators and Executors. Executors and administrators may lease the premises of the testator or intestate for the term, or part of the term, over which they exercise control.[1] There seems to be this distinction between these representatives of a deceased person: an executor may lease the premises by direction of the will of the testator, even before probate; while an administrator has no authority independent of that vested in him by the court, and no power whatsoever (except in special cases) over the realty of the deceased.[2] While neither executor nor administrator can *disclaim* a leasehold interest of the testator or intestate,[3] yet either has power, over a term of years granted to the same, to assign or underlet, the rent being assets of the estate.[4] It is doubtful, however, whether leases created by an executor or administrator, though valid in law, would be upheld by a court of equity. Indeed, it seems well settled that equity will not recognize such leases if they operate to the detriment of the estate.[5]

It is always advisable for the lessee to have the legatee join the executor in creating the lease, in which event the legal title of both for the term agreed upon will pass to him, so that neither can maintain ejectment.[6]

Where there are two or more executors, any one of

[1] Bacon's Abr., Leases, I. 7; 1 Platt on Leases, 366; 1 Washb. Real Property, 304.

[2] Bank *v.* Dudley, 2 Pet. 492; Roe *v.* Summerset, 2 W. Bl. 692, 1 Atk. 462.

[3] 1 Washb. Real Property, 304; Burton, Real Property, § 972.

[4] Drew *v.* Bayley, 2 Lev. 100.

[5] Drohan *v.* Drohan, 1 Ball & B. 185 (where an under-lease was set aside); Evans *v.* Jackson, 8 Sim. 217.

[6] Fenton *v.* Clegg, 9 Exch. 680; Doe *v.* Guy, 8 East, 120.

them can create leases or transfers which will be valid as to all.[1]

§ 111. CORPORATIONS.[2] Corporations, unless restricted by their charter or forbidden by statute, have power to lease lands.[3] Indeed, this right is incidental to the right to hold real property;[4] and as corporations are, in the eyes of law, artificial persons having the same right to accumulate, enjoy, and transmit property as other individuals, the power to do all other acts appertaining to their interests, an authority to let land for a term of years or for the life of the lessee, is implied from their existence, and exist to the same extent as in individuals.[5] Great care should be taken by those leasing lands from corporations that the proper authorities execute the lease, and that the corporate name is correctly stated. Yet a slight mistake in the name will not avoid a lease, if it can be clearly shown by extrinsic evidence what corporation was intended.[6]

Formerly, in England, corporations were required to affix their corporate seal to all acts, but this rule is no longer in force there,[7] and has never been adopted in this country.[8] The same rules govern the making of leases by corporations that are applicable to individuals; that is, while they can make parol leases under

[1] Williams, Executors, 778, 810; Doe *v.* Sturges, 7 Taunt. 217; George *v.* Baker, 3 Allen, 326, n.; Roe v. Hodgson, 2 Wils. 129.

[2] *Ante*, § 5, Contracts with Corporations.

[3] Angell & Ames, Corp. § 220; 2 Kent Com. 233; People *v.* Utica Ins. Co., 15 Johns. 383.

[4] 1 Washb. Real Property, 304; McCartee *v.* Orphan Asylum, 9 Conn. 437.

[5] Curtis *v.* Leavitt, 15 N. Y. 219, 262; People *v.* Utica Ins. Co., 15 Johns. 383; McCartee *v.* Orphan Asylum, 9 Conn. 437.

[6] N. Y. Inst. for Blind *v.* Howe, 10 N. Y. 84; Sutton *v.* Cole, 3 Pick. 332; Minot *v.* Curtis, 7 Mass. 444.

[7] Ang. & Ames, Corp., § 220; 2 Kent Com. 233.

[8] Kelley *v.* Mayor etc., 4 Hill, 263; Bank *v.* Patterson, 7 Cranch, 299.

precisely similar circumstances,[1] they must affix their seal in all cases where it would be required of individuals,[2] and this must be done by the proper official or agent, as simply affixing the seal of a corporation does not render an unauthorized contract or conveyance valid.[3]

§ 112. TRUSTEES. The legal estates of property held by trustees are vested in them, and they may be regarded as the owners of the property,[4] with full power to lease the same to the extent of their interests.[5] Their authority is, however, frequently restricted by state legislation, and the peculiar powers vested in them from their appointment.[6]

Where there are two or more trustees, their interests are equal, and their control over the estate must be jointly exercised; one of their number cannot (as with a co-administrator or a co-executor) bind the estate by creating leases or any other act.[7] The *cestui que trust* has only an equitable interest, and no power whatever to create leases, and he who makes an entry upon land by virtue of a lease created by one is a mere trespasser as against the trustees.[8] The trustee, however, has no authority to exercise his legal trust to the prejudice of a *cestui que trust;*[9] and third persons dealing with a trustee without the concurrence of the benefici-

[1] Bank *v.* Dandridge, 12 Wheat. 105; Osborn *v.* Bank, 9 Wheat. 738.

[2] Ibid.

[3] Jackson *v.* Campbell, 5 Wend. 522; Bank *v.* Dandridge, 12 Wheat. 105.

[4] Hill, Trustees, 229; Story Eq. Jur. § 1062.

[5] Hill, Trustees, 482; 1 Washb. Real Property, 304.

[6] 4 Kent Com. 321; 2 Atk. Ch. 223; Sugden, Powers, 174 (6th ed.); Hill, Trustees, 229–239.

[7] 5 Story Eq. Jur. § 1062; 4 Ves. Ch. 97; 3 Atk. Ch. 384; Sinclair *v.* Jackson, 8 Cow. 543, 20 Me. 504, 11 Barb. 527.

[8] Blake *v.* Foster, 8 T. R. 487, 492.

[9] 2 Vern. Ch. 197; Hill, Trustees, 503.

ary must not seek any undue advantages, for the whole transaction is subject to the control of the equity court. It will always be well to join both the trustee and the *cestui que trust* in the demise or conveyance;[1] for if the lease is entered into by the trustee alone, the trustee may be called upon by the *cestui que trust* to account, and, if the lease be unreasonable (as for ninety-nine years[2]), the trustee and the lessee will have to restore the estate and profits, or give the beneficiary other equitable redress.[3]

Whenever a lease is made by a trustee for a long term of years at an improper rent,[4] or of such a nature that mismanagement can be implied, as where he does differently with the property than he would do with his own, it is generally inferred that the lessee is a party to the fraud.[5]

§ 113. Mortgagors and Mortgagees. In the absence of any agreement to the contrary, the mortgagee, and not the mortgagor, is entitled to possession of the mortgaged property.[6] The usual practice, however, is to insert in the instrument creating a mortgage a provision that the mortgagor shall retain possession, receiving the rents and profits of the property, and paying to the mortgagee interest on the money borrowed. At common law the mortgagee cannot recover rent of the mortgagor for the time he suffers him to retain possession, unless the mortgagor becomes, by virtue of another agreement, the lessee of the

[1] Malpas *v.* Ackland, 3 Russ. 273.
[2] 4 Kent Com. 438; 4 How. 503.
[3] Atty. Gen. *v.* Owen, 10 Ves. 560.
[4] Atty. Gen. *v.* Brooke, 18 Ves. 326.
[5] Atty. Gen. *v.* Brooke, 18 Ves. 326; Atty. Gen. *v.* Cross, 3 Mer. 539; Atty. Gen. *v.* Owen, 10 Ves. 560.
[6] 4 Kent Com. 155; 33 Md. 181; 3 Md. Ch. 186; 8 G. & J. 39.

premises.[1] As possession by lessor is at common law a requisite of a valid lease, it is said that a mortgagor cannot lease the mortgaged property unless he has reserved the right of possession; yet, as between the parties (mortgagor and lessee), the contract may be binding, for the former has power to lease so long as he remains upon the land subject to the incumbrances.[2] If the mortgage is prior to the lease, the lessee stands in the place of the mortgagor, and he will not be liable for rent to the mortgagee until the latter shall have taken possession.[3] So, where leases are granted by the mortgagor after the mortgage has been given, the tenant may be ejected by the mortgagee without notice to quit;[4] but the mortgagee cannot distrain or sue for rent, as the relation of landlord and tenant is not established between the mortgagee and the mortgagor's tenant.[5] If, however, the lessee of the mortgagor pays rent to the mortgagee, he becomes the tenant of the latter;[6] but if the lessee does not pay rent to the mortgagee, or in any other way recognize him as his landlord, the only remedy is ejectment.[7] A tenant under a lease made *prior* to the mortgage cannot be dispossessed (unless he *fails to keep* his covenants) by the mortgagee,

[1] 1 Washb. Real Property, 571, citing Wilder *v.* Houghton, 1 Pick. 87; Mayo *v.* Fletcher, 14 Pick. 525.

[2] Wellington *v.* Gale, 7 Mass. 138; Collins *v.* Torry, 7 Johns. 278.

[3] Russell *v.* Allen, 2 Allen, 44; Morse *v.* Goddard, 13 Met. 177; Smith *v.* Shephard, 15 Pick. 147; Trent *v.* Hunt, 9 Exch. 24, and cases there collected.

[4] Coote, Mortg. 332; Mayo *v.* Fletcher, 14 Pick. 525; Walmesley *v.* Milne, 7 C. B. N. S. 115, 133. *Contra*, Lane *v.* King, 8 Wend. 584.

[5] 1 Platt on Leases, 165; Woodfall, 49; Rogers *v.* Humphreys, 4 A. & E. 299, 313; Corbett *v.* Plowden, L. R. Ch. D. 678.

[6] Doe *v.* Hales, 7 Bing. 322; Tud. Cas. 11; Doe *v.* Barton, 11 A. & E. 307; Coote, Mortg. 347.

[7] Willard *v.* Harvey, 5 N. H. 252, 1 Smith's Lead. Cas. 697; Hungerford *v.* Clay, 9 Mod. 1.

who is to be treated as the assignee of the reversion with no other rights than those of the mortgagor;[1] but the mortgagee is entitled to rent accruing after giving notice of the mortgage to the lessor.[2]

The mortgagee is the owner of the property after the mortgage, and entitled to immediate possession, which he can gain at any time by ejectment,[3] excepting where, as above mentioned, there is an existing underlease, made prior to the mortgage. It is therefore evident that a mortgagor has generally no authority to grant leases,[4] and when he is allowed to collect rents it is by virtue of special stipulations, and in lieu of rents he pays interest upon the debt. The mortgagee's power to lease the property is also restricted, for he cannot make a lease that will deprive the mortgagor of the equity of redemption.[5]

It is therefore unsafe to enter into a building lease with either a mortgagor or mortgagee alone, for, as we have seen, the mortgagee may defeat leases made by the mortgagor, and the mortgagor's equity of redemption may defeat those made by the mortgagee. For this reason care should always be taken, when the permanency of the lease is desired, that both the mortgagor and mortgagee join, or at least concur, in the execution.[6]

§ 114. TENANTS FOR YEARS. It may be stated generally that a tenant for years or for life may either assign

[1] Moss *v.* Gallimore, 1 Dougl. 278; Rogers *v.* Humphreys, 4 Ad. & E. 299.

[2] Ibid., and Pope *v.* Briggs, 9 B. & C. 245.

[3] Doe *v.* Maisey, 8 B. & C. 767; Doe *v.* Gile, 5 Bing. 421; Cro. Jac. 659.

[4] Keech *v.* Hall, 1 Dougl. 21; Rogers *v.* Humphreys, 4 Ad. & E. 299.

[5] Newell *v.* Wright, 3 Mass. 138, 151; Scott *v.* Fritz, 51 Pa. St. 418; Hungerford *v.* Clay, 9 Mod. 1; Franklinski *v.* Ball, 34 L. J. Ch. 153.

[6] Doe *v.* Adams, 2 C. & J. 23; Carpenter *v.* Parker, 3 C. B. N. S. 206; 1 Platt on Leases, 173.

his entire interest[1] or sublet[2] the premises, provided there is no covenant to the contrary in the original lease. There is no privity of estate between the original lessor and the tenant of the lessee or sub-lessee,[3] and the latter cannot be sued by the former upon the lessee's covenants.[4] It must not be understood, however, from the above statement, that the *land* is discharged from the claims of the original lessor, for, on the contrary, the latter may distrain upon the chattels of the sub-lessee.[5] An under-tenant is justified in paying his rent to the original lessor, and not his immediate landlord, if necessary to save his estate.[6]

When a lessee underlets the premises he becomes the landlord of the sub-lessee, and may thereby be totally divested of the right of possession;[7] yet he can compel his tenant to pay rent by the same remedies the original proprietor has against him, and enforce all covenants made with him.[8] The power of distress is incidental to the letting, and the sub-lease need not specify this as a reservation.[9]

[1] Palmer *v.* Edwards, 1 Dougl. 187 n.; Poultney *v.* Holmes, 1 Strange, 405; Lynde *v.* Rough, 27 Barb. 415; Robinson *v.* Perry, 21 Ga. 183; Eten *v.* Luyster, 60 N. Y. 252.

[2] King *v.* Aldborough, 1 East, 297; 1 Washb. Real Property, 336; Taylor, L. and T. 22; Eten *v.* Luyster, 60 N. Y. 253; Jackson *v.* Harrison, 17 Johns. 66; Shaw *v.* Farnsworth, 108 Mass. 857.

[3] 1 Washb. Real Property, 339; Halford *v.* Hatch, 1 Dougl. 183; Robinson *v.* Lehman, 72 Ala. 401, 1 East, 502.

[4] Williams, Real Property, 336; Jennings *v.* Alexander, 1 Hilton, 154; Dartmouth Col. *v.* Clough, 8 N. H. 22; Halford *v.* Hatch, 1 Dougl. 183; Earl of Derby *v.* Taylor, 1 East, 502; Robinson *v.* Lehman, 72 Ala. 401.

[5] Arnsby *v.* Woodward, 6 B. & C. 519.

[6] Peck *v.* Ingersoll, 3 Seld. 528.

[7] Nave *v.* Berry, 22 Ala. 382, 31 Ala. 412; Shannon *v.* Burr, 1 Hilton, 39, 25 Pa. St. 229.

[8] McFarlan *v.* Watson, 3 N. Y. 286; Jackson *v.* Davis, 5 Cow. 129; Ritzter *v.* Raether, 10 Daly, 286.

[9] Co. Lit. 141 b, 142 a; Curtis *v.* Wheeler, 1 Mood. & M. 493.

It should be remembered that an under-lease must be for a period of time less than the term of the lessor,[1] for when the whole interest is alienated it amounts to an assignment.[2] And it is evident that a tenant cannot create an under-lease which shall run for a longer period than his own, thereby curtailing his landlord's estate.[3]

§ 115. TENANTS FOR LIFE. A tenant for life has the right to lease his interest; but only in special cases, and by virtue of a power specially vested in him, can he lease for a period beyond his own life or that of the *cestui que vie*.[4] No man can confer on another an estate larger than he himself possesses.[5] Accordingly, if the tenant for life die before the rent of his tenant is due, his representatives cannot recover the amount due up to his death.[6] While he has power to assign his entire estate or underlet any portion of it for any period not exceeding his own,[7] he cannot do so except by deed.[8]

Several States have statutes regulating the duration of leases created by tenants for life. In New York, for instance, he may, by virtue of a power vested in him, make leases for not more than twenty-one years, to commence in possession during his life.[9]

§ 116. TENANTS AT WILL. The chief characteristics of

[1] 2 Prest. Conv. 125; Palmer *v.* Edwards, 1 Dougl. 187; Doe *v.* Bateman, 2 B. & Ald. 168.

[2] 1 Washb. Real Property, 336; 2 Platt on Leases, 421; Pingrey *v.* Watkins, 15 Vt. 479, 488.

[3] Pike *v.* Eyre, 9 B. & C. 909; Oxley *v.* James, 13 M. & W. 209; Kelley *v.* Patterson, L. R. 9 C. P. 681.

[4] Strafford *v.* Wentworth, 1 P. Wms. 180; Williams, Ex'rs, 709.

[5] *Ex parte* Smyth, 1 Swanst. 353; Symons *v.* Symons, 6 Madd. 207; Doe *v.* Archer, 1 B. & P. 531.

[6] Perry *v.* Aldrich, 13 N. H. 343, 15 Mass. 268.

[7] Jackson *v.* Van Hoesen, 4 Cow. 325.

[8] Stewart *v.* Clark, 13 Met. 79.

[9] N. Y. R. S. 733, § 87.

a tenancy at will are, that it is not constituted until the lessee has taken actual possession,[1] and that it is determinable any time at the will of either party to the demise.[2] From the uncertainty of its duration, the tenant's interest is not defeasible,[3] and he has nothing to assign or sublet.[4] If he surrenders the estate his interest is determined;[5] so, also, if he makes a feoffment of the land to a third party,[6] or leases it,[7] or if the landlord sells the land to a stranger.[8] If the lessee at will holds over after the ownership of the estate has changed hands, he will be no longer a tenant at will, but a tenant at sufferance.[9] It seems, however, if the owner of the land, or his assignee, has encouraged the tenant at will to expend money in building or other improvements, in contemplation of a continuance of holding, the landlord will not be allowed to profit from such improvements by terminating the tenancy.[10]

§ 117. JOINT TENANTS. "When several persons have any subject of property jointly between them in equal shares by purchase," or otherwise, a joint tenancy is created.[11] At the death of one of the joint owners, his interest does not pass to his heirs or personal representatives, but survives to the other joint owner or own-

[1] Cheever *v.* Pearson, 16 Pick. 272; Co. Lit. 55 a; Pollock *v.* Kittrell, 2 Taylor (N. C.), 152.

[2] 2 Flint, Real Property, 215; Co. Lit. 55 a; Cheever *v.* Pearson, 16 Pick. 272.

[3] 1 Washb. Real Property, 383.

[4] 2 Flint, Real Property, 215; Co. Lit. 57 a, 270 b.

[5] Moss *v.* Gallimore, 1 Dougl. 23; Clark *v.* Wheelock, 99 Mass. 14.

[6] Rising *v.* Stannard, 17 Mass. 286.

[7] Hildreth *v.* Conant, 10 Met. 298; Kelly *v.* Waite, 12 Met. 300.

[8] Manchester *v.* Dodridge, 3 Ind. 360; Ferrin *v.* Kenney, 10 Met. 294; Rising *v.* Stannard, 17 Mass. 286.

[9] Ibid., and Co. Lit. 47 b; Coakley *v.* Chamberlain, 1 Sweeny, 678.

[10] Stile *v.* Cowper, 3 Atk. 692; Jackson *v.* Cator, 5 Ves. 688; Dane *v.* Spurrier, 7 Ves. 231.

[11] 1 Washb. Real Property, 421, citing Co. Lit. 180 b; 1 Prest. Est. 130.

ers.[1] There may be a joint tenancy whether the estate be in fee, for life, for years, or at will.[2] It never arises by operation of law, as it can be created only by purchase or by act of the parties.[3]

A joint tenant can convey or lease his share in the estate,[4] but he cannot transfer anything more than his undivided interest; and to grant an entire interest, or lease, it is necessary that all the joint tenants join in the deed.[5] If one joint tenant makes a lease of his moiety for years, and dies before the lessee's entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expires.[6] So, if one joint tenant makes a lease to commence after his death, his co-tenant will be bound by it.[7]

§ 118. TENANTS IN COMMON. Where two or more persons hold lands and tenements by several and distinct titles and occupy it in common, the only unity being that of possession, what is known as a tenancy in common is constituted.[8] One of the tenants may convey or lease his share to the other,[9] or to a stranger;[10] indeed, he may do whatsoever he pleases with

[1] Venerable, Real Property in Maryland, 94, citing 2 Bl. Com. 180 (the right of survivorship has been abolished in many States); Williams, Real Property, 153; 3 Kent Com. 357.

[2] 2 Bl. Com. 179; 2 Flint, Real Property, 323; Co. Lit. 183 b.

[3] Putney *v.* Dresser, 2 Met. 583; 2 Bl. Com. 180.

[4] 1 Washb. Real Property, 426.

[5] Cunningham *v.* Pallet, 99 Mass. 248; Anderson *v.* Tompkins, 1 Bro. C. C. 456, 463.

[6] 1 Taylor, Landlord and Tenant, 124.

[7] Ibid., citing Grate *v.* La Croft, Cro. Eliz. 287; Whitlock *v.* Horton, Cro. Jac. 91.

[8] 2 Bl. Com. 191; Bouvier, Law Dictionary; 1 Washb. Real Property, 430.

[9] Cro. Jac. 83, 611; Keay *v.* Goodwin, 16 Mass. 1.

[10] Johnson *v.* Harris, 5 Hayw. N. C. 113; Anderson *v.* Tompkins, 1 Brock. (Va.) 456, 463; Cunningham *v.* Pattee, 99 Mass. 248. A sealed

his interest, so long as he does not injure his co-tenant.[1] If, however, he erects buildings or makes other improvements, he cannot compel his co-tenant to pay his share.[2] There is this great distinction between a tenancy in common and a joint tenancy, that if, in the former case, all the parties join in a lease, it is regarded as a lease by each of his own part,[3] that is, practically, several leases;[4] while a lease by joint tenants is but one indivisible interest or lease, for they have but one freehold.[5]

§ 119. PARTNERSHIPS. An estate in partnership arises where land is purchased or leased by two or more partners in the usual course of business, or out of partnership funds.[6] It is not a joint estate,[7] for the ordinary rules of partnership do not apply, the law construing their holding as a tenancy in common.[8] Neither partner can convey or lease more than his undivided interest.[9] At common law, one partner could not bind an-

lease executed by one tenant in common "for himself and as agent of" the co-tenants, and signed by him alone, is valid. Harms *v.* McCormick, 132 Ill. 104, 22 N. E. R. 511.

[1] Peabody *v.* Minot, 24 Pick. 329, 333.

[2] Thurston *v.* Dickinson, 2 Rich. Eq. 317. A tenant in common, building a house on the common land solely for his own convenience, the house not being necessary for the protection or preservation of the property, cannot be allowed to charge the co-tenant with his share of the cost. Stephenson *v.* Cotter, 5 N. Y. Suppl. 749. See Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. R. 1075; Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. R. 441.

[3] 2 Prest. Abst. 77; 1 Washb. Real Property, 433.

[4] 2 Rol. Abr. 64; Sheppard's Touchstone, 268, n. 3.

[5] Ibid.

[6] 1 Washb. Real Property, 438; Coles *v.* Coles, 15 Johns. 159.

[7] Balum *v.* Shore, 9 Ves. 500, 3 Bro. C. C. 199.

[8] Ibid., and Coles *v.* Coles, 15 Johns. 159; Goodwin *v.* Richardson, 11 Mass. 469; Delaney *v.* Hutcheson, 2 Rand. 183; Rohrburg *v.* Reed, 57 Mo. 392; Palmer *v.* Sawyer, 114 Mass. 19 (firm taking lease after dissolution of partnership).

[9] Story on Partnership, § 101; 5 Hill, 107.

other to a lease,[1] and the right of one partner to dispose of the partnership property is still restricted to personal property, not being applicable to real estate.[2] Yet in some of the States this doctrine is relaxed to the extent that one partner may execute a deed for all of the others if done in their presence.[3]

§ 120. AGENTS. An agent, if properly authorized by the owner of the interest in the land, can execute a lease of the same;[4] but to do so, his authority must be perfect and rigidly followed, and the act done must be done as that of the principal, and not as of the agent acting for himself.[5] In many cases, however, the appointment of an agent may be implied from his habit to do such acts.[6]

The Statute of Frauds requires the authority of agents to do certain acts to be in writing; and while the provisions thereof might apply to the execution of a lease, it is not generally held that written authority must be given to an agent to enter into an agreement for a lease.[7] Where a lease is required to be under seal, the appointment of the agent must also be under seal,[8] though equity may compel the principal to ratify the act of his agent if a seal only is lacking.[9]

The power of attorney authorizing an agent to execute a lease must always be recorded if the lease is required to be recorded.[10]

[1] Harrison *v.* Jackson, 7 T. R. 207; Dillon *v.* Brown, 11 Gray, 179.

[2] Story, Partn. § 101; 1 Brock. (Va.) 456, 463; 1 Met. (Mass.) 518.

[3] Mills *v.* Barber, 4 Day, 428; Grazebrook *v.* McCreedie, 9 Wend. 439; Gram *v.* Seton, 1 Hall, 262; Butler *v.* Stocking, 8 N. Y. 408.

[4] Sheppard's Touchstone, 270; Coombe's Case, 9 Co. 76.

[5] Ibid.

[6] Story on Agency, §§ 239, 260.

[7] Lake *v.* Campbell, 18 Ill. 109; Lawrence *v.* Taylor, 5 Hill, 107.

[8] Blood *v.* Goodrich, 9 Wend. 68, 5 Mass. 40, 10 Paige, 386.

[9] Story on Agency, § 49; Harrison *v.* Jackson, 7 T. R. 207.

[10] Stewart *v.* Hall, 3 B. Mon. 220.

§ 121. USUAL TERMS FOR BUILDING LEASES. There is no fixed rule as to running time of building leases. But, on account of the expenditure of money upon buildings and other improvements, it is always advisable to procure leases for long periods, renewable at pleasure. The practice in some places is to create leases for sixty or ninety (or, as in Maryland, ninety-nine) years, renewable forever. While the law does not prohibit leases being made for any period, however long, the court will consider all the stipulations of the lease and circumstances of the particular case as indicating the real intention of the parties.[1] Thus, a term for nine hundred and ninety-nine years was held to be too extravagant, although there was a stipulation for expending money upon buildings, but the expenditure was commensurate with a term of ninety-nine years only.[2] Generally, building leases provide that rent shall not commence until a future day certain, or upon the completion of the buildings.

§ 122. TENANT IN FEE SIMPLE. For the reasons stated in the preceding section, building leases are usually created by the owner of the fee. From the fact that "a fee simple is the largest possible estate which a man can have in lands,"[3] and that the owner has absolute power of disposing of it as he chooses, it follows that he can make building leases for any number of years, upon any terms he deems proper.[4]

[1] Earl of Shrewsbury *v.* Keightley, L. R. 2 C. P. (Ex. Ch.) 130.

[2] 1 Platt on Leases, 35, citing Atty. Gen. *v.* Green, 6 Ves. 452; Atty. Gen. *v.* Backhouse, 17 Ves. 291.

[3] 1 Washb. Real Property, 53.

[4] Com. Dig., Estates (G. 2).

CHAPTER XVI.

BUILDING LEASES UNDER POWERS.

§ 123. NATURE OF POWERS GENERALLY. It is not within the province of this treatise to enter into a detailed discussion of powers, yet it is deemed advisable to give a brief outline of the general doctrines thereof, in order to more clearly set forth the subject as applied to building leases. "A power is an authority enabling a person, through the medium of the Statute of Uses, to dispose of an interest in real property, vested either in himself or another person:"[1] but it may be "a mere right to limit a use;"[2] or "a mode or medium of raising a future use;"[3] or, as defined by the New York Revised Statutes,[4] "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform;" or "a method of causing a use, with its accompanying estate, to spring up at the will of a given person."[5] A "power appendant" is one which the donee is authorized to exercise out of the estate limited to him, and which depends for its validity upon the estate which is

[1] Bouvier, Law Dictionary; Clere's Case, 6 Coke, 17 b; Sugd. Powers, 82; 4 Kent Com. 316.

[2] 4 Kent Com. 334; 2 Washb. Real Property, 301.

[3] Cornish, Uses, 89.

[4] N. Y. R. S. 732, § 78 *et seq.*

[5] Mansfield v. Mansfield, 6 Conn. 559; 2 Washb. Real Property, 300; Williams, Real Property, 245.

in him.[1] A "power in gross" is one which gives a donee authority to create such estates only as will not attach on the interest limited to him, but will enable him to create an estate independent of his own.[2]

§ 124. American Law. Powers do not in this country, as in England,[3] constitute an important branch of the law of real property. It is there said that every well-prepared will or settlement of an estate should contain a power for leasing,[4] while here such provisions are extremely uncommon.[5] In New York and one or two other States, the common law of powers has been abolished and the whole matter made subject to statutory regulations.[6] Yet elsewhere in this country the doctrines and principles of powers are recognized as forming part of our law.[7]

§ 125. Creation and Destruction of Powers. Powers may be created by deed or by will,[8] by grant or by reservation.[9] The reservation need not be in the same instrument if made at the same time.[10] No particular form of words is necessary to create a power,[11] but the intention must be manifest;[12] yet an equitable construction of words will be applied.[13]

[1] Burton, Real Property, § 179; Bergen *v.* Bennett, 1 Caines Cas. (N. Y.) 15.

[2] Wilson *v.* Troup, 2 Cow. (N. Y.) 237; Tudor, Lead. Cas. 293; Burton, Real Property, § 180.

[3] 2 Washb. Real Property, 312; 2 Greenl. Cruise, 474, n.

[4] See remarks of Lord Mansfield, cited in Platt on Leases, 393; Atkyns *v.* Hord, 1 Burr. 120, 121; Campbell *v.* Leach, 2 Ambl. 748.

[5] 2 Greenl. Cruise, 474, n.; 2 Washb. Real Property, 312.

[6] N. Y. R. S. 732, § 73 *et seq.;* Lalor, Real Property, 180.

[7] 2 Washb. Real Property, 311.

[8] Dorland *v.* Dorland, 2 Barb. 80; 2 Washb. Real Property, 312.

[9] 4 Kent Com. 319; 1 Sugd. Pow. 96.

[10] 1 Sugd. Pow. 158.

[11] 2 Washb. Real Property, 315; Dorland *v.* Dorland, 2 Barb. 80.

[12] Jameson *v.* Smith, 4 Bibb, 307; Funk *v.* Eggleson, 92 Ill. 511; Pomeroy *v.* Partington, 3 Term Rep. 665.

[13] Jackson *v.* Veeder, 11 Johns. 169; Rew *v.* Bulkley, Dougl. 293.

Any one having capacity to contract, or to make a valid will, may execute a power over his own land;[1] an infant can execute a collateral power;[2] and a *feme covert* may do the same without her husband's consent,[3] whether for his benefit or for that of a stranger.[4] If the manner of executing a power is not prescribed, it may be done by an instrument in writing, with or without seal;[5] but if a form is required by law, the requirement must be strictly complied with.[6] The execution of a power cannot take place by an assignee,[7] unless authorized by the limitation[8] or coupled with an interest;[9] nor can a power to appoint by deed be executed by will, or *vice versa*;[10] nor can a power be delegated when accompanied by a personal trust,[11] unless the execution be merely formal.[12]

A power may be extinguished or destroyed by a complete execution thereof;[13] by any assurance which carries the whole of the grantor's estate;[14] by a release,[15] and sometimes by the death of the donee, or by performance becoming impossible.

[1] Sugd. Pow. 148; 4 Kent Com. 324; Logan *v.* Bell, 1 Com. B. 872.
[2] 2 Greenl. Cruise, 482; 4 Kent Com. 324.
[3] Wright *v.* Talmadge, 15 N. Y. 307; 2 Greenl. Cruise, 484.
[4] Hover *v.* Samaritan Society, 4 Whart. 445; Rush *v.* Lewis, 21 Pa. St. 72.
[5] 4 Kent Com. 320; Hawkins *v.* Kemp, 3 East, 430.
[6] 2 Washb. Real Property, 321; Longford *v.* Eyre, 1 P. W. 740; Doe *v.* Smith, 1 Brod. & B. 92.
[7] 2 Washb. Real Property, 321.
[8] 4 Cruise, 211.
[9] Wilson *v.* Troup, 2 Cow. (N. Y.) 237.
[10] Darlington *v.* Pulteny, Cowp. 260.
[11] Tanner *v.* Clark, 13 Met. 226; Berger *v.* Duff, 4 Johns. Ch. 368; Cole *v.* Wade, 16 Ves. 27.
[12] Ibid.
[13] 2 Greenl. Cruise, 576; Hawkins *v.* Kemp, 3 East, 410.
[14] Sugd. Pow. 57; Barton *v.* Briscoe, 1 Jacob, 603.
[15] 1 Russ. & M. 431, 436; 1 Coke, 102 b.

§ 126. Powers as Applied to Building Leases. We have already seen that the power to lease lands by one in possession thereof is incidental to the right of ownership, and this authority is supplemented by the operation of the Statute of Uses, whereby it is competent to convey lands so that seisin shall be in one, with a *power* in another to create a leasehold interest for a third person.[1] In such a case the latter derives his estate from the original conveyance, while the donee is the medium through which it is ascertained in whose favor the lease shall take effect.[2]

A lease under a power arises from the estate of the donor of the power, and therefore is not limited to the life of the donee.[3]

§ 127. Instances. Where the instrument contained an authority in a general way "to insert all usual powers," it was held that the trustee could insert powers of granting building leases.[4] But a tenant for life or in tail, or other person having a limited estate, cannot create a lease binding against a remainder-man or reversioner without an express power being given; it cannot be implied from general statements susceptible of other meaning.[5] So, while a power of leasing conferred upon a woman is not relinquished by coverture, but can be executed by her jointly with her husband,[6] a stipulation in a marriage settlement that it should contain a power of leasing for twenty-one years

[1] 1 Washb. Real Property, 305.

[2] Ibid., citing Smith, Land. and Ten. 43; Williams, Real Property, 254; 2 Crabb's Real Property, 725; Maundrell *v.* Maundrell, 10 Ves. 246.

[3] Sugd. Pow. ch. 7, §§ 8, 11.

[4] Hill *v.* Hill, 6 Sim. 145; Duke of Bedford *v.* Marquis, etc., 1 Myl. & Cr. 312.

[5] Duke of Bolton *v.* Grantham, 3 Burr. 1259.

[6] 2 Platt on Leases, 401; even the concurrence of husband is not definitely settled.

in possession, and "all usual powers," does not authorize a power to grant building leases, although from change of circumstances the situation of the premises might be rendered extremely eligible for buildings.[1]

The nature, design, and mode of execution of powers being dependent upon various circumstances, the intention of the donor is to be ascertained from the meaning of the words used,[2] and by considering whether the lease is designed for agricultural, mining, or building purposes,[3] — in short, the ordinary rules of construction of written instruments will apply.[4]

It seems that if one acts upon a pretended power, or wrongfully assumes authority not vested in him by granting leases, although the lessee by virtue thereof has entered into possession, the owner of the land is estopped from revoking the lease if he recognizes the lessee as his tenant, or accepts benefits from the operation of the lease.[5]

Marriage settlements, which, by the way, are uncommon in this country, but of frequent occurrence in England, ordinarily contain stipulations whereby tenants for life are authorized to create leases which shall extend beyond the period of their own estates.[6] The usual practice is to authorize the one who is to have

[1] Pearce *v.* Bacon, Jacob, 158.

[2] Hall *v.* Bulkley, 1 Dougl. 279; Griffith *v.* Harrison, 4 T. R. 737.

[3] 1 Platt on Leases, 395; Jegon *v.* Vivian, L. R. 2 C. P. 422, 3 H. L. Cas. 285, 36 L. J. C. P. 145.

[4] Ibid., and Pomeroy *v.* Partington, 3 T. R. 665; Bartlett *v.* Rendle, 3 M. & S. 99.

[5] McClain *v.* Doe, 5 Ind. 237; Kendall *v.* Carland, 5 Cush. 74. These cases have arisen from questions of agency rather than the wrongful assumption of powers, and, although they serve to support the text, the subject under discussion must not be confounded with mere powers of attorney, which are authorizations of agencies for particular acts.

[6] 1 Washb. Real Property, 305; Williams, Real Property, 254; Maundrell *v.* Maundrell, 10 Ves. 246.

the estate for life to make leases for twenty-one years, and in such cases the lessee will have the right to hold for his whole term, though the tenant for life dies before his lease expires.[1] If the lease is for a longer term than authorized by the power, it will hold for the full time for which it could have been made, but not in excess thereof.[2] A power to lease for ninety-nine years is rarely if ever given in a marriage settlement, unless under peculiar circumstances.[3]

§ 128. Form and Effect of Powers in Building Leases. While no particular form of words is necessary either to create or to execute a power, and either words of common law demise or of apportionment may suffice, the intention of the donor to create, or the appointee to execute, must be clear.[4] In drafting an instrument conferring a power to create leases, it will be well to provide (1) that a proper rent shall be reserved; (2) that the desired covenants be inserted; (3) that the lease shall not be in reversion, but in possession;[5] yet, if the settlement does not stipulate as to covenants, any covenant may be inserted or omitted if not detrimental to the estate in reversion.[6]

A power of leasing cannot be delegated,[7] but it may be conferred upon the assignee of the estate of the first donor.[8]

[1] 4 Cruise, 157; Sugd. Pow. ch. 10, § 1; Maundrell *v.* Maundrell, 10 Ves. 246; Rew *v.* Bulkley, 1 Dougl. 292; 2 Washb. Real Property, 305.

[2] Campbell *v.* Leach, Ambl. 740, Tud. Lead. Cas. 317.

[3] Atty. Gen. *v.* Owen, 10 Ves. 560.

[4] 1 Platt on Leases, 407.

[5] Sudg. Pow. 711, 835; 1 Platt on Leases, 394.

[6] Emden on Building, 40, citing Goodtitle d. Clarges *v.* Finucan, 2 Dougl. 575; Isherwood *v.* Oldknow, 3 M. & S. 382.

[7] See citation in Coombe's Case, 9 Co. 76 a, Palm. 436; Coxe *v.* Daily, 15 East, 118; Symons *v.* Symons, 6 Madd. 207.

[8] Whitefield *v.* Howe, 2 Show. 57; Collett *v.* Hooper, 13 Ves. 255.

So, where the execution of a power is dependent upon the acquiescence of a third person, his consent must be given in the manner prescribed,[1] and if he dies,[2] or becomes a lunatic,[3] before his consent is obtained, the power cannot be exercised at all.

The strictness with which a power must be executed is further extended to cover an exact compliance with stipulations requiring it to be exercised in writing,[4] or within the time agreed upon.[5] Yet in certain instances there may be an equitable as well as a legal execution of a power.[6] For instance, where an agreement for a lease by a tenant for life was finally concluded within the power, a court of equity held that it was as binding upon the holder of the remainder as a formal lease would have been,[7] and specific performance was decreed.[8]

Although a power to lease for a chattel interest will not authorize the grant of a freehold,[9] yet, where the power was given to lease all or any part of the land for any time or term desired, with or without renewals it was held that this broad power authorized leases for 999 years with fines.[10]

It may be sometimes desirable to insert clauses in

[1] 1 Platt on Leases, 404.

[2] Danne *v.* Annas, etc., 2 Dyer, 219 a; Simpson *v.* Hornsled, Prec. Ch. 452.

[3] *Ex parte* Smyth, 2 Swanst. 393.

[4] 1 Platt on Leases, 404, and citations therein.

[5] Freshfield *v.* Reed, 9 Mees. & Wel. 404.

[6] 1 Platt on Leases, 408.

[7] Campbell *v.* Leach, 2 Ambl. 740; Lowe *v.* Swift, 2 Ball & B. 537; Symons *v.* Symons, 6 Madd. 20; Clarke *v.* Moore, 1 Jo. & La Tou. 723.

[8] Corry *v.* Corry, Wallis & Lyne, 278.

[9] 1 Platt on Leases, 425; Evans *v.* Vaugh, 4 Barn. & Cr. 261; 6 Dow. & Ry. 349.

[10] Atty. Gen. *v.* Moses, 2 Madd. 294; Atty. Gen. *v.* Wray, Jacob, 307 (1,000 years); Atty. Gen. *v.* Green, 6 Ves. 452.

settlements or wills providing for the apportionment of rents when several buildings are contemplated to be erected upon the land.[1]

"A power to grant building leases will not authorize a mere repairing lease without any obligation to build."[2] Thus, where trustees had power to grant building leases, but granted those which contained no covenants to build, though they contained covenants to repair and keep the property in order, the lease was declared invalid for the absence of a covenant to build.[3]

[1] Emden on Building, 42, citing Doe d. Pulteney *v.* Cavan, 5 T. R. 567.

[2] Emden on Building, 44, and illustrative cases.

[3] Hallett *v.* Martin, L. R. 24 Ch. D. 624, 52 L. J. Ch. 804, 32 W. R. 112.

CHAPTER XVII.

WASTE IN BUILDINGS BY LESSEES.

§ 129. General Statement. Tenants for life or for a term of years are generally liable for waste.[1] Waste may be defined to be a spoiling or destroying of the estate with respect to the lands, houses, or other corporeal hereditaments.[2] Voluntary waste is that which consists in the commission of some destructive act, as tearing down buildings, uprooting gardens, etc.;[3] while permissive waste is that which results from the mere omission or neglect to do what will prevent injury, as suffering buildings or other improvements to go to decay.[4] In the absence of any express agreement to the contrary, the lessee or tenant is bound to keep the demised premises in as good condition as he found them, that is, to make all necessary repairs;[5] damages resulting from the act of God, as lightning and tempest, or from invasion by the public enemy, or other inevitable accident, being alone excepted.[6] The law of waste is regulated by statute in many of the States.

§ 130. Pulling Down Buildings. Waste is ordinarily committed by a lessee in pulling down buildings,[7] re-

[1] 2 Black. Com. 281; 4 Kent Com. 75; Crockett *v.* Crockett, 2 Ohio St. 180; Pynchon *v.* Stearns, 11 Met. 304.

[2] Bouvier, Law Dictionary; Walker's American Law, 312.

[3] 1 Washb. Real Property, 108; 1 Paige Ch. (N. Y.) 573.

[4] Bouvier, Law Dictionary, for distinction, note; 3 Dane Abr. 214; 2 Black. Com. 281; 1 Washb. Real Property, 108.

[5] 4 Bos. & P. 298; 10 Barn. & Cr. 312.

[6] 2 Rolle Abr. 818; 10 Ad. & E. 398; 4 Leon. 240.

[7] Co. Lit. 53 a; 2 Greenl. Cruise, 1224; Clemence *v.* Steere, 1 R. I. 272.

moving floors, wainscots, benches, shelves, furnaces, windows, doors, or other things fixed to a freehold.[1] So, also, in unroofing or altering structures[2] in any manner, or permitting them to decay,[3] or changing them from one kind to another, as a dwelling-house to a store,[4] or rebuilding them in a different style.[5] It does not alter the case that the improvements or alterations by the tenant are advantageous to the property,[6] as where a lessee, after pulling down an old building, erects another upon a more favorable site.[7] So strict was the common law in this respect that the building of a house where there was none before,[8] or tearing it down after it had been built, were deemed waste.[9] A more liberal rule of construction, however, is applied in this country, and also in England, at the present time. A tenant will generally not be held liable for waste so long as he has not done, or suffered to be done, any act which will *materially* or *permanently* change the nature of the property, or render it impossible for him to restore the premises substantially as he found them when he took possession.[10] In the case just cited

[1] Austin *v.* Stevens, 24 Me. 520; Wall *v.* Hinds, 4 Gray, 256; Thatcher *v.* Plinney, 7 Allen, 146. In an action of waste for removing buildings, the measure of damages is the diminution in the market value of the premises, not the market value of the houses. Stoudenmire *v.* De Bardelaben, 84 Ala. 74, 4 So. R. 723. An injunction will lie to prevent the removal of a building by a tenant from the leased premises. Dougherty *v.* Spencer, 23 Ill. App. 357.

[2] Co. Lit. 53 a; Douglass *v.* Wiggins, 1 Johns. Ch. 435; Agate *v.* Lowenstein, 57 N. Y. 604.

[3] 2 Greenl. 124; Long *v.* Fitzsimmons, 1 Watts & S. 530.

[4] 1 Washb. Real Property, 113; Taylor, Landlord and Tenant, 166.

[5] Huntley *v.* Russell, 13 Q. B. 588.

[6] 2 Rolle Abr. 815, pl. 17, 18.

[7] Greene *v.* Cole, 2 Saund. 252, n. 7; Huntley *v.* Russell, 13 Q. B. 588.

[8] Co. Lit. 53 a.

[9] 2 East, 88; 4 Pick. 310; 1 H. & J. (Md.) 289.

[10] Winship *v.* Pitts, 3 Paige Ch. 262.

of *Winship* v. *Pitts*, it was held that "it is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. He has no right to pull down valuable buildings, or to make improvements or alterations which materially or permanently change the nature of the property. . . . It cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation as it was at the commencement of the tenancy, and the materials of which the new buildings are composed, if left on the premises, would more than compensate the owner of the reversion for the expense of their removal."[1] So cutting a door in a house,[2] tearing down an old dilapidated building and erecting a better one in its stead,[3] building a new smoke-house in place of an old one,[4] removing a building erected by the tenant but not affixed to the freehold,[5] were held not to be waste.

§ 131. PERMISSIVE WASTE. A tenant is required to use ordinary care to prevent buildings going to decay, yet he is not bound to make extraordinary expenditures in that direction,[6] and he may defer repairs until

[1] Winship *v.* Pitts, 3 Paige Ch. 262; Beers *v.* St. John, 16 Conn. 329.

[2] Young *v.* Spencer, 10 B. & C. 145; Jackson *v.* Tibbitts, 3 Wend. 341.

[3] Beers *v.* St. John, 16 Conn. 329.

[4] Sarles *v.* Sarles, 3 Sandf. Ch. 601; Clemence *v.* Steere, 1 R. I. 272.

[5] Clemence *v.* Steere, 1 R. I. 272. *Contra*, if affixed to freehold, Austin *v.* Stevens, 24 Me. 520; Washburn *v.* Sproat, 16 Mass. 449.

[6] Wilson *v.* Edmonds, 24 N. H. 517, 4 Foster, 517. In Sherrill *v.* Connor, 107 N. C. 630, 12 S. E. R. 588, it was held that a tenant in dower was not liable for permissive waste of large barns and outbuildings built before the war to meet the needs of a plantation cultivated by slaves, unless the buildings were such as a prudent owner of the fee would keep up in order to prevent permanent injury to the inheritance.

they shall be less expensive.[1] If he erects a new house upon the land, he is under the same obligation to keep it in repair as he was the old one.[2] But if the old house was in a ruinous condition when he took possession, he is not liable for waste if he has suffered it to remain so.[3] Nor is he responsible for the ordinary wear and tear of the premises.[4]

Although a tenant is liable for waste committed by a stranger,[5] he is not responsible when the damage is caused by lightning, tempest, or the public enemy.[6] The common law also held a tenant to be answerable for damages done by fire, accidental or otherwise, but this has been changed by an English statute,[7] which has generally been reënacted, with or without modifications, throughout the United States. The injury or destruction of a house by lightning, tempest, etc., will not be waste, but if the tenant permits an unroofed house to remain so, thereby inflicting further damage, he commits waste.[8] Yet it may be stated, as a general rule, that if a fire or other inevitable accident occurs, without the privity or fault of the tenant, while he is exercising due care, he will not be liable in the absence of a covenant to the contrary.[9]

[1] Harvey *v.* Harvey, 41 Vt. 373.

[2] 3 Dane Abr. 215.

[3] Clemence *v.* Steere, 1 R. I. 272; Co. Lit. 53 a.

[4] Torriano *v.* Young, 6 Car & P. 8. The estate of a legal tenant for life is not liable for permissive waste. *In re* Cartwright, Avis *v.* Newman, 41 Ch. D. 532.

[5] 2 Dougl. 745; 1 Taunt. 198; 1 Den. N. Y. 104.

[6] Sheppard Touchst. 173; 4 Kent Com. 77; 5 Coke, 21.

[7] 14 Geo. III. c. 78.

[8] Co. Lit. 53 a; 3 Dane Abr. 221; Pollard *v.* Shaffer, 1 Dall. 210, 2 Rolle Abr. 818, 10 Ad. & E. 398.

[9] 1 Greenl. Cruise, 133, n.; Clark *v.* Foot, 3 Johns. 421; Barnard *v.* Poor, 21 Pick. 378.

§ 132. Effect of Covenants and Powers in Building Leases. It frequently happens that there is a stipulation contained in the lease that the lessee shall hold the lands without impeachment of waste. It is perfectly competent for such leases to be made,[1] and, although this was held at common law as a license to commit waste,[2] equity early put a reasonable construction upon this clause by restraining the tenant from pulling down houses and destroying property unreasonably.[3]

But, in building leases, any act which is authorized by the covenants of the lease, or within the terms of the power creating it, can be permitted without being punishable as waste.[4] Thus, where the power stipulated that "no such lease can be made with impeachment for waste by any express words," it was held that the donee might authorize the pulling down of the old buildings in order to erect new ones.[5] Another illustration is found in a case where the power authorized the tenant for life to lease the premises to any person willing to build, and to lease certain mines so that the lessees thereof be not made "*dispunishable* for waste by any express words." The lessees, however, were permitted, by the lease made under this power, to dig and use stone from the premises for building purposes, and the jury found that a power to build was necessary and usual. The court held that the lease was not in excess of the power.[6] If a lessee, under a lease exempt-

[1] 1 Washb. Real Property, 117.
[2] Co. Lit. 220; 11 Coke, 81 b; 15 Ves. 425.
[3] 2 Vern. Ch. 739; 3 Atk. Ch. 215; 6 Ves. Ch. 110; 16 Ves. Ch. 375.
[4] Doe d. Hopkinson *v.* Ferrand, 20 L. J. C. P. 202.
[5] Jones d. Cowper *v.* Verney, Willes, 169; Chance, Pow. 347; Doe d. Lord Egremont *v.* Stephens, 6 Q. B. 208.
[6] Morris *v.* Rhydydefed Colliery Co., 3 H. & N. 473, 485.

ing him from impeachment for waste, underlets the premises, his sub-tenant will have the same exemption as himself.[1] Neither, however, is at liberty, wilfully and maliciously, to commit waste, and, if either do so, a court of equity may interpose by injunction.[2] Leases containing such covenants are seldom found in this country.[3]

[1] 2 Bl. Com. 283, n.; Cholmeley *v.* Paxton, 2 Bing. 207, Tud. L. Cas. 67.

[2] Washb. Real Property, 121, citing Marker *v.* Marker, 4 Eng. L. & Eq. 95; Vane *v.* Lord Barnard, 2 Vern. 738.

[3] 4 Kent Com. 78, n.

CHAPTER XVIII.

CONDITIONS AND COVENANTS IN BUILDING LEASES.

A. *Conditions Generally.*

§ 133. General Principles. A condition in a lease has been defined as a qualification annexed to the estate of the lessee, whereby it may be defeated or avoided.[1] A condition is usually stipulated with the intent of securing performance of certain provisions of the lease by stipulating that upon the breach thereof the lessor may enter and defeat the lessee's estate.[2] Conditions tending to defeat an estate for years are more favored by the law than those which tend to defeat a freehold estate.[3] When a condition or a covenant works a forfeiture, courts are inclined to give a strict rather than liberal construction;[4] thus, a condition not to underlet will not be broken by an assignment of the entire term,[5] nor, *vice versâ*, is a condition not to assign broken by underletting.[6] So, if a landlord desires to prohibit his lessee from sub-renting or

[1] Brown *v.* Bragg, 22 Ind. 122; Doe *v.* Branch, 4 Barn. & Ald. 401; Reid *v.* Parsons, 2 Elliot, 247.

[2] Williams, Real Property, 32; Jones *v.* Carter, 15 M. & W. 718; Clark *v.* Jones, 1 Denio, 516.

[3] Burton, Real Property, § 852; Lloyd *v.* Crispe, 5 Taunt. 249; Cartwright *v.* Gardner, 5 Cush. 211.

[4] 1 Washb. Real Property, 315; Crusoe *v.* Bugby, 3 Wils. 234; Doe *v.* Smith, 5 Taunt. 795; Spear *v.* Fuller, 8 N. H. 174; Den. *v.* Post, 25 N. J. L. 285.

[5] Lynde *v.* Hough, 27 Barb. 415; Den *v.* Post, 1 Dutch. 285; Greenaway *v.* Adams, 12 Ves. 400.

[6] Crusoe *v.* Bugby, 3 Wils. 234; Doe *v.* Smith, 5 Taunt. 795; Greenaway *v.* Adams, 12 Ves. 400.

assigning, he must insert a condition to that effect.[1] A condition not to alien will not operate as a forfeiture where the lessee goes into bankruptcy, unless expressly stipulated.[2]

While a lessor may with propriety require any reasonable covenants or conditions to be inserted in the lease which are not illegal, or contrary to public policy,[3] a lessee will be released from an entire condition if the lessor accepts a part performance of it.[4]

A condition may be created by the phrases, *on condition, provided,* and *so that;* but the words, *if it happen,* do not make a condition unless followed by a clause of reëntry;[5] and the first mentioned may sometimes operate as a qualification or limitation, and sometimes as a covenant: the construction, however, is dependent upon the intention of the parties as gathered from the instrument.[6]

§ 134. Covenants Generally. It may be generally stated that, where the wording of a lease is such that a doubt is left whether a condition or a covenant was intended, the courts will construe clauses as covenants only, rather than as conditions or conditional limitations.[7] Covenants are either express or implied.[8]

While any covenant in the least pertinent to the

[1] Den *v.* Post, 25 N. J. L. 285; Crusoe *v.* Bugby, 3 Wils. 234, 1 Smith's Lead. Cas. 66.

[2] 1 Washb. Real Property, 315; Smith *v.* Putnam, 3 Pick. 221; Jackson *v.* Corlis, 7 Johns. 221; Burton, Real Property, § 854.

[3] Roe d. Hunter *v.* Galliers, 2 Term Rep. 133; Pennant's Case, 3 Rep. 64.

[4] Dakin etc. *v.* William, 17 Wend. 447; Cartwright *v.* Gardner, 5 Cush. 281; Doe *v.* Bliss, 4 Taunt. 735.

[5] 2 Hilliard Abr. Real Property, 362.

[6] Ibid.

[7] Wheeler *v.* Dascomb, 3 Cush. 285; Doe *v.* Phillips, 2 Bing. 13.

[8] 1 Washb. Real Property, 323; Mayor *v.* Maybie, 13 N. Y. 160; Tone *v.* Brace, 8 Paige, 597; Ross *v.* Dysart, 33 Pa. St. 452, 1 Hilliard Abr. Real Property, 140.

object of the lease may be introduced therein as an express covenant,[1] those which are implied by the law, independently of express stipulations, are comparatively few,[2] particularly if the lease has been clearly drawn, with due attention to details; extraneous covenants will rarely be implied, unless the same can be readily inferred from the language used.[3]

As it is not within the scope of a work like this to enter into detail upon implied covenants of leases, this chapter will be chiefly confined to express or restrictive stipulations common in building leases; yet it is deemed advisable to casually mention those covenants which are classed as "implied" or "usual," and may be exacted independently of the phraseology of the lease.[4]

Covenants may be construed as dependent or independent, according to the intention of the parties, to be gathered from the lease. The form of a covenant, or the manner in which the stipulations are to be performed by either party as stated in the instrument, is of but little importance.[5]

There is implied on the part of the lessor a covenant that the indenture is good in law, and that he has power to assign;[6] that he will save the lessee harmless from former grants or incumbrances;[7] that he will do nothing to interrupt the lessee's free enjoyment of the premises.[8] There is implied on the part of the lessee a

[1] Taylor, Landlord and Tenant, § 431.

[2] Wilkins *v.* Fry, 2 Swanst. 249; 1 Washb. Real Property, 325.

[3] Bruce *v.* Bauch, 16 Hun, 615, 79 N. Y. 154.

[4] Wilkins *v.* Fry, 2 Swanst. 249; Clark *v.* Clark, 49 Cal. 586. In a lease executed by a guardian for his ward, there are no implied covenants. Webster *v.* Conley, 46 Ill. 13.

[5] Hill *v.* Bishop, 2 Ala. 328.

[6] Bensel *v.* Gray, 38 N. Y. 447; Souler *v.* Drake, 5 B. & Ad. 992.

[7] Ibid., and Mechan *v.* Scott, 2 Hilt. 550.

[8] Dexter *v.* Manley, 4 Cush. 24; Baugh *v.* Wilkens, 16 Md. 35; Mack *v.* Patchin, 42 N. Y. 167; Berrington *v.* Casey, 78 Ill. 317.

covenant that he will pay rent;[1] that he will perform all the other covenants mentioned in the lease, and save the lessor harmless from breach thereof;[2] that, if no time is fixed for the payment of rent, it will be paid at the end of the term;[3] that he will use the premises in a proper manner, and not commit waste.[4] The following covenants are *not* implied by the lessor: to rebuild in case the premises are destroyed by fire,[5] or to repair;[6] or that he will save the lessee harmless from acts of strangers or mere trespassers;[7] or that he will repay the lessee for any repairs he may make upon the property;[8] or that he will protect the lessee from consequences of excavations by adjoining owners;[9] or that he will warrant the premises for the particular use for which demised, or that they are well built,[10] or even fit for habitation;[11] or that he will renew the lease.[12]

A lessee is not bound by any express covenants contained in a lease when he has not signed the instru-

[1] Smith, Landlord and Tenant, 96; Royer *v.* Ake, 3 Pa. St. 461; Van Rensselaer *v.* Smith, 27 Barb. 140. A covenant to build is never implied. Woods, Landl. and Ten. 73, 74; Bowles *v.* Croll, 6 E. B. 264.

[2] Howard *v.* Lovemore, L. R. 6 Exch. 43.

[3] Ridgely *v.* Stillwell, 27 Mo. 128.

[4] Nave *v.* Berry, 22 Ala. 382, *ante*, preceding chapter; Lynch *v.* Onondaga, 64 Barb. 558.

[5] Cowell *v.* Lumley, 39 Cal. 151; Doupe *v.* Genin, 45 N. Y. 119; Sheets *v.* Selden, 7 Wall. 423.

[6] McAlpin *v.* Powell, 70 N. Y. 126; Kramer *v.* Cook, 7 Gray, 553; Morse *v.* Maddox, 17 Mo. 569.

[7] Moore *v.* Weber, 71 Pa. St. 429; Williams *v.* Young, 21 Cal. 227.

[8] Washb. Real Property, 325.

[9] Howard *v.* Doolittle, 3 Duer, 464; Sherwood *v.* Seaman, 2 Bosw. 127.

[10] Libbey *v.* Talford, 48 Me. 316; Jaffe *v.* Harteau, 56 N. Y. 398.

[11] Foster *v.* Peyser, 9 Cush. 242 (premises built as a hotel may be used as a young ladies' seminary); Nave *v.* Berry, 22 Ala. 383.

[12] Baynham *v.* Guy's Hosp., 3 Ves. 295; Banker *v.* Braker, 9 Abb. N. C. 411.

ment of demise;[1] and such instruments are generally required to be under seal.[2]

§ 135. COVENANTS TO REPAIR. When a lessor binds himself to make repairs (and this must be done by an express covenant), he is bound to make all necessary repairs without special notice from the lessee;[3] but the lessee is not justified in abandoning the premises by his failure to do so,[4] his remedy being an action for the breach of the covenant.[5] If the lessor covenants to make all necessary repairs, he is bound to put the premises in proper condition for the business for which they were leased.[6]

It frequently happens that the lessee covenants to repair; in such case he is usually bound to see that the premises do not suffer greater injury than that consequential upon ordinary wear and tear, and that he will keep the same in as good order as when the demise was made.[7]

[1] Taylor, Landlord and Tenant, § 245 (if lessor accepts unsigned instrument, and puts it on record, he thereby waives the express covenants of the lessee). Davis *v.* Lyman, 6 Conn. 249; Liffy *v.* Staples, 39 Me. 166.

[2] Harper *v.* Hampton, 1 H. & J. 622. Where the plaintiff leased land, and the parties afterwards executed a supplementary agreement declaring that a deed of sale executed before the lease should be binding on them, it was held that building restrictions contained in the sale instrument were binding on the plaintiff. Newbold *v.* Peabody Heights Co., 70 Md. 493, 17 Atl. R. 372.

[3] Hayden *v.* Bradley, 6 Gray, 425 (a license under seal may take effect as a covenant, 66 Mo. 430); Davis *v.* Townsend, 10 Barb. 333; Allen *v.* Culver, 3 Denio, 284.

[4] 1 Washb. Real Property, 325; Cowell *v.* Lumley, 39 Cal. 151.

[5] Ibid., and Welles *v.* Castles, 3 Gray, 325; Tibbets *v.* Percy, 24 Barb. 39.

[6] Ward *v.* Kelsey, 38 N. Y. 80; Flynn *v.* Hatton, 4 Daly, 552, 45 How. Pr. 333.

[7] Stanley *v.* Twogood *et al.*, 3 Bing. N. C. 4; Guttridge *v.* Munyard, 7 Car. & P. 129. The obligation, under an agreement to keep in "good, tenantable repair," is to keep in such repair, having regard to the age, character, and locality of the house, as would make it reasonably fit for the

New Buildings. If the lessee has so covenanted, he will also be bound to keep in repair new buildings erected by him during his term, in addition to those found upon the premises at the time of the letting.[1] The obligation to keep in repair new houses erected upon the land during his tenancy is precisely similar to that concerning the older improvements.[2] Yet, if the lease specially stipulated that the lessee should keep in repair the buildings then upon the premises, he will not be liable to repair those subsequently erected upon other portions of the land.[3]

A covenant to repair ordinarily includes all buildings affixed to the freehold,[4] but not in some cases to temporary structures,[5] as sheds built for fakirs, or buildings resting upon blocks or pattens.[6] In an English case, cited by Mr. Emden,[7] where a lessee, under a covenant to repair, tore down the three houses upon the land and erected four in their stead, the court held that his liability extended to the fourth house also. It seems that covenants to repair may be so framed that they virtually operate as covenants to rebuild at the end of the term.[8]

occupation of a tenant of the class who would be likely to take it. Proudfoot *v.* Hart, 25 Q. B. D. 42.

[1] Brown *v.* Blunden, Skin. 121; Douse *v.* Earle, 3 Lev. 264; Douse *v.* Cale, 2 Vent. 126; Nouaille *v.* Flight, 7 Beav. 521.

[2] See 3 Dane Abr. 215.

[3] *In re* Newberry, White *v.* Wakley, 26 Beav. 17, 28 L. J. Ch. 77; Doe d. Trustees etc. *v.* Rowlands, 9 C. & P. 734.

[4] Penry *v.* Brown, 2 Stark. 403; West *v.* Blakeway, 3 Scott N. R. 199, 218.

[5] Naylor *v.* Collinge, 1 Taunt. 19; Woodfall, Landlord and Tenant, 594, 599; Davis *v.* Jones, 2 B. & Ald. 165.

[6] Ibid.

[7] Emden on Building, 310, citing Douse *v.* Cale, 2 Vent. 125. He also cites Lant *v.* Norris, 1 Burr. 287, and other cases to the same effect.

[8] Bennett *v.* Herring, 3 C. B. N. S. 370; City of London *v.* Nash, 3 Atk. 512. Under a covenant to repair and keep up the demised premises,

§ 136. Decisions upon Covenants to Repair. Unless there is an express agreement on the part of the landlord to repair, the tenant must take the premises as he finds them, and he cannot recover for repairs made by him, or damages sustained by reason of a want of repairs.[1] So, if a tenant makes repairs or improvements on the demised premises in excess of the sum agreed on by the landlord, he cannot be allowed credit for such excess as against the rent.[2] Repairs covenanted for in a lease must be made within a reasonable time.[3] Some courts have held that, where there is no stipulation between the parties to a lease in respect to repairs, the tenant takes the risk of the future condition thereof, and is bound to keep them in repair, and that even a promise by the landlord, after the tenant is in possession, to do so, is without consideration.[4]

A general covenant of the lessee to repair demised premises is binding under all circumstances, even if the injury proceeds from the act of God, from the elements, or from the act of a stranger.[5] But where the lease is of a *building* and not of the land on which it rests, and there is no covenant to repair, the destruction of the building terminates the lease and the relation of landlord and tenant, and no rent can be re-

the lessee was held entitled to pull down and reërect certain portions of the buildings in order to avoid the purchase of them by a municipal authority. *In re* McIntosh and Pontypridd Improvements Co., 61 L. J. Q. B. 164.

[1] Smith *v.* Kinkaid, 1 Brad. 620. Nor can the custom of a locality in which the premises are situated change this rule, and make the lessor bound to pay for improvements by lessee. Biddle *v.* Reed, 33 Ind. 529.

[2] Morris *v.* Tillson *et al.*, 81 Ill. 607. A covenant by lessor to repair is not implied. Kellengberger *v.* Foreman, 13 Ind. 475.

[3] Lunn *et al. v.* Gage, 37 Ill. 19.

[4] Libbey *v.* Talford, 48 Me. 316.

[5] But see *post*, § 138; Pololack *v.* Pioche, 35 Cal. 416; Nave *v.* Berry, 22 Ala. 383; Ely *v.* Ely, 80 Ill. 532.

covered subsequent to the destruction of the building.[1] Neither the covenant to rebuild nor to repair is a usual one in leases, and cannot be demanded.[2]

Where the lessee of a store-room in a building undertakes to make all needed repairs and alterations in and about such room, the lessor by implication will be bound to keep the residue of the building in repair so as to protect the room.[3]

If a tenant from year to year abandons the premises before the expiration of a year, without the landlord's consent, he remains liable for the rent for the residue of the year; nor will he be released from such liability by the neglect of the landlord to repair, and by the fact that the condition of the premises when left was not materially different from what it was at the beginning of the year; nor by reason of trivial injuries by fire, where no demand was made on the landlord to repair them;[4] nor if the landlord accepts some other person as his tenant.[5]

A landlord is not obliged to keep the premises even tenantable,[6] but a tenant is not answerable, in the absence of a covenant, if the building occupied be destroyed by accident.[7]

"Under a covenant to repair generally, the covenantor will be bound to keep the building in as good a state as it was when the covenant was made, and to

[1] Ainsworth *v.* Ritt, 38 Cal. 89; McMillan *v.* Solomon, 42 Ala. 356.

[2] Eaton *v.* Whitaker, 18 Conn. 233.

[3] Bissell *v.* Lloyd, 100 Ill. 214. A covenant to remove rubbish, held to refer to rubbish accumulated by tenant's own use of the premises, and not that left there before his occupancy by a former tenant. Coppinger *v.* Armstrong, 5 Brad. 637.

[4] Lockwood *v.* Lockwood, 22 Conn. 433.

[5] Bacon *v.* Brown, 9 Conn. 338.

[6] Estep *v.* Estep, 23 Ind. 114.

[7] Wainscott *v.* Silvers, 13 Ind. 497.

make good all deteriorations arising from natural decay or inevitable accident; but he is not bound to do more, as to avert the consequences of the elements, but only to keep it in the state in which it was at the time of the demise, by timely expenditure of money and care." [1]

"There is no implied obligation between owners of distinct parts of a building, which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby the plaintiff is injured." [2] So, "the owner of a room on the lower floor of a dwelling-house, and the cellar under it, is not liable in assumpsit to the owner of the chamber over the room, and the remainder of the house, for contribution to necessary repairs on the roof." [3]

A lessee may maintain an action on a covenant of a lessor to repair, without previous notice to him of want of repair.[4]

§ 137. COVENANTS TO INSURE. A clause in a lease exempting the tenant from liability to restore the buildings in case of fire does not relieve him from his obligation to pay rent even in case of destruction by fire.[5] A covenant by a lessee to insure in companies approved by the lessor does not necessarily bind him to renew a previous policy in favor of the lessor. He may insure by a new policy for the benefit of both, according to their respective interests.[6]

In an Illinois case, where a tenant was bound by a covenant to rebuild in case of fire, and the landlord's

[1] Middlekauff *v.* Smith, 1 Md. 340.
[2] Pierce *v.* Dyer, 109 Mass. 374.
[3] Loring *v.* Bacon, 4 Mass. 575. See Calvert *v.* Aldrich, 99 Mass. 75.
[4] Hayden *v.* Bradley, 6 Gray, 425.
[5] Beach *v.* Farris, 4 Cal. 339.
[6] Sherwood *v.* Harral, 39 Conn. 335.

wife as owner of the property insured the same, but the tenant refused to pay the premium, it was held, in an action brought after the destruction of the premises (the tenant having voluntarily rebuilt in the interval), that he was not entitled to any contribution by the lessor, nor had he any claim, legal or equitable, to insurance money, or any part thereof.[1] Another case, where the circumstances were rather peculiar, may be stated: The lessee covenanted to erect on the leasehold premises a building worth a specified sum, and to keep the same insured. After the building was erected he obtained a decree in a court of chancery upon his building contract, and under this decree he took possession of the premises without a sale; the court held that his possession was unauthorized and permissive only, and did not make him an assignee of the lease, so as to render him liable upon the covenants contained in it, and if he, while thus in possession, insured the premises to the extent of his interest in the lease, the policy did not inure to the benefit of the lessor or his assignee, nor was the builder liable on the covenant to insure.[2]

[1] Ely *v.* Ely, 60 Ill. 532.

[2] Merchants' Ins. Co. *v.* Mazange, 22 Ala. 168. A covenant by a lessee to return the premises in good repair is a covenant to rebuild in case they are destroyed by fire. Abby *v.* Billups, 35 Miss. 618. Covenants to repair, to rebuild, or to insure are covenants running with the land. Thomas, Adm'r *v.* Vonkapff, Executors, 6 G. & J. (Md.) 372. A lease does not terminate by fire where there is no covenant to insure or repair. Fowler *v.* Glover, 4 Dane Abr. 383, 21 Pick. 431, 7 Gray, 553. Nor does partial destruction. Walls *v.* Hinds, 4 Gray, 256. But see Stockwell *v.* Hunter, 11 Met. 448.

Covenant to restore. A promise to restore premises to their original condition, made after the execution of the lease and in consideration of permission to alter, is not extinguished by the renewal of the lease without mention of restorations. Buhler *v.* Gibbons, 3 N. Y. Suppl. 815. So, also, where there were two renewals of the lease, stipulations that all alterations should be restored were held to apply to alterations under the first

§ 138. COVENANTS TO REBUILD. To illustrate the statement concluding the preceding section: an express covenant to repair and keep in repair may be so framed as to bind the lessee to rebuild in the case of fire.[1] Although neither the lessor nor lessee is bound to rebuild if the premises are destroyed by inevitable accident, in the absence of an express covenant,[2] yet it is the law that, when a lessee covenants to repair and to restore the premises in the same condition as when he received them, he will be thereby obligated to rebuild though the buildings be destroyed without his fault.[3] An effort has been made by a few courts to draw a distinction between the causes which occasioned the destruction of the property, and to exempt from the obligation of rebuilding, arising from covenants to repair, those cases where the damage resulted from the act of God to which no human agency contributed,[4] but such a distinction has not generally been recognized.[5]

Ordinarily a covenant by a lessee to rebuild will not render him liable to erect a new house in the same manner, style, shape, and elevation as the old one, for, if this is intended, it should be clearly expressed in the

lease. Hooker *v.* Banner, 76 Cal. 116, 18 Pac. R. 136. *Covenant not to alter.* A covenant to make no alterations without permission in writing may be waived by conduct of the lessor. Parton *v.* Watson, 2 N. Y. Suppl. 661.

[1] Scott *v.* Scott, 18 Gratt. 166; Holt *v.* Holt, 91 Pa. St. 88; Abby *v.* Billups, 35 Miss. 618.

[2] Post *v.* Vetter, 2 E. D. Smith, 248; Welles *v.* Castles, 3 Gray, 323; Nave *v.* Berry, 22 Ala. 383.

[3] 2 Saund. 422, n. 2; Abby *v.* Billups, 35 Miss. 618; Shep. Touch. 173. *Contra*, Warner *v.* Hitchins, 5 Barb. 656; Gibson *v.* Eller, 13 Ind. 125.

[4] Pololack *v.* Pioche, 35 Cal. 416, and cases last cited.

[5] Where, under a covenant to build and to surrender in good condition at expiration of the lease, ordinary decay and inevitable accident excepted, the building has been destroyed by fire, the tenant is excused if the

covenant.[1] Yet a lessee of a wooden building is released from his obligation under an express covenant to rebuild in the case of fire, if at the time, and subsequent to the destruction of the building, there is an enactment prohibiting the erection of frame or wooden structures.[2]

§ 139. COVENANTS FOR RENEWAL OF LEASE. It is usual in Maryland, and other States where leases for ninety-nine years are common, to stipulate that the tenant shall have the right of renewal forever. Where there is a covenant in these leases that the tenant shall renew "at any time during the term, on application of the lessee," equity will compel the lessor to renew, even after the term has expired, if the lessee has not been guilty of *laches*.[3] Care should, however, always be taken that covenants of renewal should be definite as to terms and amount of rent,[4] for covenants of this description are not favored by law, owing to their tendency to create perpetuities.[5] Yet, if clearly expressed, renewal will be specifically enforced.[6] A lessee is not bound to take a renewal of lease when the lessor only covenants to renew.[7] Yet he can generally declare his

fire could not reasonably have been prevented. Kelly *v.* Duffy (Pa.), 11 Atl. R. 244.

[1] Low *v.* Innes, 4 De G., J. & S. 286. A stipulation in the lease to "deliver up" the premises, merely imposes an obligation against holding over, and not to rebuild in case of destruction by fire. Nave *v.* Berry, 22 Ala. 383.

[2] Cordes *v.* Miller, 39 Mich. 581.

[3] Venerable, Real Prop. in Md. 44, citing Banks *v.* Haskie, 45 Md. 207.

[4] Cunningham *v.* Pattee, 99 Mass. 248; Pray *v.* Clark, 113 Mass. 283; Norton *v.* Snyder, 2 Hun, 82 (as to effect of indefiniteness).

[5] Baynham *v.* Guy's Hosp., 3 Ves. 295; Banker *v.* Braker, 9 Abb. N. C. 411.

[6] Willan *v.* Willan, 16 Ves. 84; Blackmore *v.* Boardman, 28 Md. 420.

[7] Bruce *v.* Fulton, 79 N. Y. 154.

option any time before the expiration of the running lease.[1]

It has been held in California that a covenant for a lease to be renewed indefinitely, at the option of the lessee, is in effect the creation of a perpetuity, and is against the policy of the law.[2] So, in Connecticut, a lease for 999 years to an ecclesiastical society, for a sum paid down, was held to be practically a conveyance in fee, and void under a statute.[3] The policy of the law, therefore, seems to discourage these long-term leases and indefinite renewals, and courts will generally require that covenants for this purpose be taken advantage of within at least a reasonable time after the expiration of the term. Thus, in an Indiana case, where a lease for five years contained a covenant for renewal, the court held that the lessee must elect to renew the lease at or before the expiration of the first term; that it was too late to do so after the expiration of eighteen months and notice to quit; that holding over did not renew the lease for another five years.[4] But a reasonable time for renewal will usually be given. In another case, renewal of a ninety-nine years' lease was compelled after more than three years.[5]

The relation of landlord and tenant exists, no matter for how long a term a lease may be made.[6]

[1] Renoud *v.* Daskam, 34 Conn. 512; Thiebaud *v.* First Nat. Bank, 42 Ind. 212.

[2] Morrison *v.* Rossignol, 5 Cal. 64.

[3] See, as to these long-term leases, Brainerd *v.* Colchester, 31 Conn. 410, 411; Seymour *v.* Hartford, 21 Conn. 486; Hart *v.* Cornwall, 14 Conn. 228; Osborn *v.* Humphrey, 7 Conn. 339.

[4] Thiebaud *v.* First Nat. Bank, 42 Ind. 212, 40 Ind. 521; Falley *v.* Giles, 29 Ind. 114.

[5] Banks *v.* Haskie, 45 Md. 207.

[6] Venerable, Real Property in Md. 44, citing Carroll *v.* Shipley, 41 Md. 81.

§ 140. COVENANTS RUNNING WITH THE LAND. In order to fix the liability of the assignee of a lessee to covenants made in an original lease, it is often important to distinguish those covenants which run with the land from those which are personal, and which do not bind the estate.[1] Spencer's Case[2] is regarded as the leading case upon this subject, and in the cases cited below will be found a full discussion of the law on this point as to covenants to pay rent,[3] to insure,[4] to reside on the premises,[5] to repair or deliver up in good condition,[6] to abstain from carrying on offensive trades,[7] to permit the lessor to use certain rooms,[8] to cultivate the land in a particular manner,[9] to renew the lease perpetually,[10] to pay for new buildings erected on the land,[11] to do services on the premises,[12] to maintain fences.[13] So, also, negatively, covenants not to let premises for a

[1] 1 Washb. Real Property, 326; Burton, Real Property, § 855; Taylor, Landlord and Tenant, § 260.

[2] 1 Smith's Lead. Cas. 139 *et seq.* The lease of apartments in a building in a town confers upon the lessee only such an interest in the subjacent land as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are destroyed by fire this interest ceases, and of course does not run with the land, for the relation of landlord and tenant is dissolved by the destruction of the demised premises. McMillan *v.* Solomon, 42 Ala. 356.

[3] Demarest *v.* Willard, 8 Cow. 206; Graves *v.* Porter, 11 Barb. 592; Howland *v.* Coffin, 12 Pick. 125.

[4] Vernon *v.* Smith, 5 B. & Ald. 11; Thomas, Adm'r *v.* Vonkapff, Executors, 6 Gill & J. 372; Doe *v.* Beck, 1 Barn. & Adol. 428.

[5] Tatem *v.* Chaplin, 2 H. Bl. 133.

[6] Bennet *v.* Waller, 23 Ill. 97; Spencer's Case, 5 Co. Rep. 16; Pollard *v.* Shafer, 1 Dall. 210.

[7] Payne *v.* Haines, 16 M. & W. 454. See § 148, *infra*.

[8] Bush *v.* Callis, 1 Show. 389.

[9] Mayor *v.* Patteson, 10 East, 130.

[10] Blackmore *v.* Boardman, 28 Mo. 420; Piggot *v.* Mason, 1 Paige, Ch. 412.

[11] Hunt *v.* Danforth, 2 Curt. C. C. 592.

[12] Norman *v.* Wells, 17 Wend. 136; Morse *v.* Aldrich, 19 Pick. 449.

[13] Kellogg *v.* Robinson, 6 Vt. 276.

certain purpose,[1] not to erect buildings in front of others,[2] not to assign or sublet,[3] run with the land. Yet a covenant by a lessor with the lessee not to exercise a particular trade on *another* parcel of land does not bind the grantee of the latter parcel.[4] Nor can an assignee be held answerable for breaches of covenants before he became such.[5]

Various rules have been laid down to determine covenants running with the land; for instance, Mr. Justice Best declared that "a covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the land." In other words, "if it is a covenant beneficial to the owner of the estate, and no one but the owner of the estate, and therefore may be beneficial to the estate, and so directly within the principle on which the covenants are made to run with the land."[6]

Other eminent authority establishes the rule that, if a covenant refers to a thing in being, and touch or concern the estate, as to rebuild or repair, it runs with the land;[7] and if it relates to a thing not in being, which yet is to be done upon the land with a beneficial tendency, whether to enhance its value or increase the enjoyment of the occupant, the assignee, if named, will be bound.[8] Yet if the covenant be to do some act, not

[1] Norman *v.* Wells, 17 Wend. 136.

[2] Trustees *v.* Cowen, 4 Paige, 510.

[3] Williams *v.* Earle, 9 B. & S. 740, 753.

[4] Taylor, Landlord and Tenant, § 261; Taylor *v.* Owen, 2 Blackf. 301.

[5] Paul *v.* Nurse, 8 Barn. & Cr. 486; Huitze *v.* Thomas, 7 Md. 348; Johnson *v.* Sherman, 15 Cal. 287.

[6] Vernon *v.* Smith, 5 B. & Ald. 11; Laffan *v.* Naglee, 9 Cal. 677; Platt, Covenants, 534.

[7] Spencer's Case, 5 Co. Rep. 16.

[8] Taylor, Landlord and Tenant, § 260, citing Spencer's Case, 5 Co. Rep.

upon the premises and only collateral thereto, such as to build a house upon adjoining land, or to pay a collateral sum to the lessor or to a stranger, it would not run with the land.[1] In other words, "it must not only concern the land, but there must be a privity of estate between the contracting parties,"[2] and must affect the nature, quality, or value of the property or its mode of enjoyment, and not be merely collateral.[3]

Implied covenants run with the land;[4] so do covenants for quiet enjoyment, whether express or implied;[5] so, too, a covenant to pay taxes or assessments.[6]

§ 141. PENALTIES. It sometimes happens that penalties are affixed in leases for breach of covenants, and it is often a difficult matter to determine whether the sum to be paid for the valuation is in the nature of a penalty or of liquidated damages. This subject has already been discussed in this treatise,[7] and it is only deemed necessary to add here that, in case of a penalty, equity will not allow a recovery to be had thereon, but will direct an issue to ascertain the amount of damages, and

16, and Hansen *v.* Meyers, 81 Ill. 321. A covenant to insure held to run though word "assigns" not in lease. Masury *v.* Southworth, 9 Ohio St. 340.

[1] Spencer's Case, *supra;* Platt, Covenants, 1; 1 Washb. Real Property, 331; Keppell *v.* Bailey, 2 Mylne & K. 517; Dolph *v.* White, 12 N. Y. 296; Curtis *v.* White, Clarke, 389.

[2] Taylor, Landlord and Tenant, § 261, and citations there given.

[3] Ibid., citing Norman *v.* Wells, 17 Wend. 136; Dunn *v.* Barton, 16 Fla. 765.

[4] Markland *v.* Crump, 1 Dev. & Bat. 94; Howland *v.* Coffin, 12 Pick. 125; Harvey *v.* McGraw, 44 Tex. 412. A covenant to purchase improvements may run. Frederick *v.* Callahan, 40 Iowa, 311.

[5] Shelton *v.* Codman, 3 Cush. 318, 2 N. Y. 394.

[6] Kearney *v.* Post, 1 Sandf. 105.

[7] See Part I. §§ 58–68, Ch. IX.

compel the lessor or lessee to pay a reasonable compensation for the breach.[1]

§ 142. Discharging Express Covenants. Actual performance is the only means by which a covenantor can discharge his express covenant,[2] except with the concurrence of the covenantee. If the covenantee does some positive act which defeats performance,[3] as where a lessee took possession before the lessor had time to fulfil his covenants, the waiver of an exact performance may be implied.[4] It may be sufficient excuse, however, where the covenantee simply forbids the covenantor to proceed.[5]

B. *Covenants Peculiar to Building Leases.*

§ 143. General Directions. The following express covenants are frequently inserted in building leases and contracts: —

The builder, acting as lessee, covenants that he will complete the building or buildings in a satisfactory manner, subject to the approval of the lessor, or his architect or superintendent; that he will not trespass upon adjoining land; that he will erect houses of certain dimensions, of not less than a specified value; that he will erect buildings suitable for the purpose for which they are designed; that he will construct all proper roads, give bond, if necessary, for the completion of his undertaking; that he will see that local ord-

[1] Taylor, Landlord and Tenant, § 671, citing Sloman *v.* Walter, 1 Bro. C. C. 418 (an agreement to perform certain work by a limited time under a certain penalty is not to be construed as liquidated damages). Tayloe *v.* Sandford, 7 Wheat. 113.

[2] Stone *v.* Dennis, 3 Porter, 231.

[3] Borden *v.* Borden, 5 Mass. 67.

[4] Carrell *v.* Read, Cro. El. 371.

[5] Porter *v.* Stewart, 2 Ark. 427.

inances are complied with, and have streets or alley-ways cut through and paved; that he will erect all houses with uniformity of elevation, etc., and not outside of the building line. Sometimes the lessor of the ground covenants that he will improve the adjoining land by houses uniform with those undertaken by the lessee or builder; or that he will allow certain easements, roads, or drains, or use in common of alley-ways over his land.

The owner of the land, when he leases the same for building purposes, should, with the view to the security he acquires in the building for the payment of his ground-rent, see that the builder is restricted by covenants from erecting buildings inferior to those contemplated, or for use of offensive trades; while the builder should assure himself that the lessor is the owner of the fee, or tenant for a long term; that his lease is made for as long a period as can be obtained, and *renewable* at pleasure; that covenants which bind him are not too restrictive, nor the rent-charge too high;[1] and that the adjoining land, if owned by the same lessor, will not subsequently be improved by buildings of a nature which will detract from the value of the premises.

§ 144. Time Covenants. Where a lessee agreed to erect certain buildings within a specified time with a power of reëntry to the lessor, although no lease was to be granted until the buildings were completed, it was held that the lessor might reënter or maintain ejectment if the buildings were not completed by the time agreed upon.[2] But if no time is fixed in the lease for the erection of the buildings, the lessee may erect the same at any time during the term, and even his

[1] Andrew *v.* Aitkin, L. R. 22 Ch. D. 218, 52 L. J. Ch. 295, 31 W. R. 425.

[2] Doe *v.* Ekins, Ry. & M. 29; Doe *v.* Birch, 1 M. & W. 402.

positive declaration that he would not build at all is not a breach of his agreement.[1]

It seems that a covenant to build within a given time is not a continuing covenant; and if the lessee fails to build, the receipt of rent by the lessor, accruing after the end of the time given, is a waiver of the forfeiture.[2] On the other hand, where a contract of lease of a hotel stipulated that the building should be ready for occupancy by a certain time, it was held that the lessee could recover for any damage sustained by him for defects in its general construction unfitting it for the use of a hotel, and that taking possession thereof did not bar the lessee's claim, nor did the fact that the lessor had sent competent mechanics to make the repairs.[3] It should be remembered, however, that the failure of a lessor to make repairs, alterations, or build additions to the demised premises, is not an excuse or bar to the payment of rent,[4] nor is even the destruction of the premises by fire,[5] excepting where only *part* of the building was leased.[6]

[1] Palethorpe *v.* Bergner, 52 Pa. St 149.

[2] McGlynn *v.* Moore, 25 Cal. 384.

[3] Swift *v.* E. W. Hotel Co., 40 Iowa, 322.

[4] Bryan *v.* Fisher, 3 Blackf. 316; Spencer *v.* Burton, 5 Blackf. 57.

[5] Womack *v.* McQuarry 28 Ind. 103.

[6] Ibid. See, also, Wood *v.* Long *et al.*, 28 Ind. 314. In a Maryland case, M. covenanted with R. and others, building committee of the German Reformed Congregation, that he should and would, on or before the first day of —— next, in consideration, etc., well and substantially erect, build, complete, and finish a church on ground belonging to the congregation, according to specifications and dimensions following, etc. The committee were to pay a specified sum when M. should give sufficient bond for faithful performance of the work, another sum when the brick wall should be commenced, etc. In case of extras, M. was to be paid so much as the work was reasonably worth. It was held: 1st. That if an action could be sustained on the covenant for work done by M., then the action of assumpsit could be brought. 2d. That M. could recover on the covenant for extra work, though done after the stipulated time. 3d. That the time condition

§ 145. Covenants to Build in a Particular Manner.[1] While no precise or technical words are necessary to create an express covenant,[2] an indefinite covenant, as where one simply agrees to erect such a house as he may deem proper, binds the covenantor to nothing.[3] It is, therefore, extremely important that the buildings to be undertaken be described with reasonable definiteness. As we have already said, a decree of specific performance will not ordinarily be decreed in a covenant to erect a house of a certain style or pattern.[4] Yet if the covenant binds the lessee to build a house or houses to correspond with the adjoining houses already built, as to elevation, etc., a court of equity may exact specific performance.[5] At common law a covenant (being a contract under seal) could not be altered by pa-

did not refer to the extra work. 4th. A suit for the extra work could only be maintained on the covenant. 5th. That if the agreement had contained no covenant in relation to extra work, its terms would have made the time for the completion of the building of its essence. Ramsburg *v.* McCahan, 3 Gill, 341.

[1] The lessee of land agreed to build a grain elevator upon it, and to furnish the lessor at all times with certain elevator facilities. The lessor agreed that the total amount of grain received there should reach a certain figure. The lessor was not excused for a deficiency of receipts because at certain times the lessee was not able to handle all grain offered. Hoyt *v.* R. Co., 39 Fed. R. 4, 5. Under a covenant in an agricultural lease to cultivate in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighborhood, the tenant has a right to erect glass-houses on the arable part of the premises, for the cultivation of tomatoes, grapes, etc., such a mode of cultivation being practised on other farms in the neighborhood. Meux *v.* Cobley, 1892, 2 Ch. 253.

[2] Davis *v.* Lyman, 6 Conn. 249; Bull *v.* Follett, 5 Cow. 170 (covenant may be in form of a condition or exception); Holder *v.* Taylor, 1 Rolle Abr. 518; Penn *v.* Preston, 2 Rawle, 14.

[3] Rosher *v.* Williams, L. R. 20 Eq. 210, 44 L. J. Ch. 419; Andrew *v.* Aitken, L. R. 22 Ch. D. 218, 52 L. J. Ch. 295.

[4] *Ante*, § 99.

[5] Franklyn *v.* Tuton, 5 Madd. 469; Mosely *v.* Virgin, 3 Ves. 184; Nokes *v.* Gibbon, 3 Drew. 651.

rol agreement,[1] so that even a request not to commence a building would not discharge a covenant,[2] but equity courts and subsequent legislative enactments have considerably modified this rule.[3]

A builder is always excused from performing covenants which would involve a violation of a statute or a local ordinance, although the duty undertaken may have been lawful at the time of the covenanting.[4] Thus, a builder is not compelled to erect a frame dwelling, although he has covenanted to do so, when such erections are forbidden by town laws.[5] So, also, where a person who had covenanted for himself and his assigns not to build on certain lands was compelled by act of parliament to assign said lands to a railway corporation. It was held that the lessor and his assignee were discharged from the covenant.[6]

§ 146. UNIFORMITY IN BUILDING. While it is perfectly lawful for a lessor to exact a covenant from his lessees that they will observe uniformity in building, and not erect any building above or beneath a certain elevation, and any lessee who ignores such a condition may be enjoined or restrained,[7] it seems that, if the lessor dispenses with such a covenant in favor of one tenant, he can only claim damages at law for breach by the others; for if he takes away the benefit of his general plan from some of his tenants, he cannot come into a court of equity for an injunction against the others.[8]

[1] Littler *v.* Holland, 3 T. R. 590.
[2] Cordwent *v.* Hunt, 8 Taunt. 596.
[3] *Ante*, Ch. XV.
[4] Cordes *v.* Miller, 39 Mich. 581; Brewster *v.* Kitchell, 1 Salk. 198.
[5] Cordes *v.* Miller, 39 Mich. 581.
[6] Baily *v.* De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. 98.
[7] Lloyd *v.* London, C. & D. Ry. Co., 2 De G., J. & S. 568; Foster *v.* B. W. & D. Ry. 2 W. R. 378.
[8] Roper *v.* Williams, Turn. & R. 18.

Where a covenant stipulated that "no building except dwelling-houses" not costing less than £200 each should front opposite to the plaintiff upon a certain road, and the party who came into possession erected a garden-wall alongside the road eight feet high, it was held to be a breach of the covenant; yet, while damages were awarded, an injunction was refused.[1] But the erection of a brick wall six feet in height, with a coping one foot in height, as a fence, was held not a violation of a restriction that no building should be erected within ten feet of the street.[2] "Opposite a certain plot of land," when used in such a covenant, means only the land which is immediately opposite, and of the same width as that demised.[3]

If a lessee agrees to take down an old house and build a new one in its stead, he is not bound, in the absence of an express agreement, to build the new one in the same style and shape as the one he pulls down.[4] In another case, where the defendant covenanted to build private houses only, of a certain value each, but erected for one of them a stable with a bedroom over it, yet left sufficient space for it still to be possible to build the house, it was held that he had not thereby violated his covenant.[5]

Yet, generally, a court will restrain one from violating a covenant not to build beyond the building line.[6] A projecting bay window may be regarded as a

[1] Bowes *v.* Law, L. R. 9 Eq. 636.

[2] Nowell *v.* Boston Academy, 130 Mass. 209.

[3] Patching *v.* Dubbins, Kay, 1, 2 Eq. R. 71. An agreement not to construct any flats in the plaintiff's "immediate neighborhood" is sufficiently definite to be enforced, and a building on a lot immediately opposite is within it. Lewis *v.* Gollner, 129 N. Y. 227.

[4] Low *v.* Innes, 4 De G., J. & S. 286.

[5] Russell *v.* Baber, 18 W. R. 1021.

[6] Coles *v.* Sims, 5 D. G., M. & G. 1, 23 L. J. Ch. 258.

violation thereof;[1] so, also, a projection in the rear of a house,[2] and ornamental projections.[3] If the lessor desires, he can covenant not to build upon adjoining land, and his agreement will be binding,[4] for, although he covenants that the adjoining land shall be forever left open and not built upon, he does not violate any principle of public policy.[5] A simple agreement between the owners of adjacent estates for the erection of buildings thereon in a uniform manner, and at a certain distance from the street, does not by implication require that the building shall thereafter remain in the same position, or the same style or shape, as when erected.[6]

§ 147. COVENANT TO PRESERVE AN OUTLOOK. The common law imposes no restriction upon a person from building, simply because the structure he desires to erect will injure his neighbor's view or prospect.[7] As the right to an outlook over the property of another can be acquired by grant or covenant only, and never by prescription,[8] to erect a building obscuring the same is not committing a nuisance.[9]

[1] Lord Manners *v.* Johnson, L. R. 1 Ch. Div. 673, 45 L. J. Ch. 904; Coles *v.* Sims, *supra*.

[2] Gaskin *v.* Balls, L. R. 13 Ch. Div. 324.

[3] Simpson *v.* Smith, L. R. 6 C. P. 87.

[4] McLean *v.* McKay, L. R. 5 P. C. 327.

[5] Ibid.

[6] Hubbell *v.* Warren, 8 Allen, 173. Where the landlord was the owner of several buildings subject to a general scheme of building restrictions, and leased one of them to the plaintiff with a similar restrictive covenant, the plaintiff was held entitled to enforce the restrictions of the original scheme against the landlord, although the landlord had made no contract on the point with the plaintiff, and the latter was merely aware of the scheme before the lease was concluded. Spicer *v.* Martin, 14 App. Cas. 12.

[7] Atty. Gen. *v.* Doughty, 2 Ves. Sen. 453; Aldred's Case, 9 Co. Rep. 58 b.

[8] Emden on Building, 287.

[9] Per Lord Hardwicke in Atty. Gen. *v.* Doughty, 2 Ves. Sen. 453; Aldred's Case, 9 Co. Rep. 58 b.

If the right of prospect could be acquired as an ordinary easement, *i. e.*, by prescription, the growth of towns and cities would be greatly restricted; in fact, to use the language of Lord Hardwicke, "there could be no great town."[1] An injunction, therefore, will not be granted to restrain the erection of a building simply because it obstructs the plaintiff's store from the view of passers-by.[2] An agreement or covenant, however, may be made,[3] or implied from representations made in securing the lease,[4] whereby the right to an uninterrupted outlook may be established.[5]

§ 148. Covenants as to the Purposes to Which Buildings are Put. Leases founded upon immoral or illegal considerations will not be upheld by the courts.[6] The knowledge that the lessee intended to use the premises for an illegal or immoral purpose would not of itself be sufficient to avoid the lease, unless the lessor was a party thereto,[7] although declared void by statute.[8]

It is frequently desirable to insert a covenant in a building lease restraining the lessee from erecting any

[1] Atty. Gen. *v.* Doughty, 2 Ves. Sen. 453.

[2] Butt *v.* Imperial Gas Co., L. R. 2 Ch. 158; Smith *v.* Owen, 35 L. J. Ch. 317, W. R. 422.

[3] Piggott *v.* Stratton, 1 De G., F. & J. 33; Tulk *v.* Moxhay, 2 Ph. 774.

[4] Piggott *v.* Stratton, *supra;* seaview case.

[5] Under a lease of second floor front rooms "with all the rights and privileges thereto belonging," it was held that the landlord could not add other rooms between the street and the leased rooms, interrupting the view of the street. Brande *v.* Grace, 154 Mass. 210, 31 N. E. 633.

[6] Dyett *v.* Pendleton, 8 Conn. 727; Smith *v.* White, L. R. 1 Eq. 626. Although such leases may generally be said to be void, they will not be so construed as to operate against innocent persons holding under the lessee as sub-tenants. Kellogg *v.* Carkin, 3 Chand. 133; Mollow *v.* Irwin, 1 Sch. & L. 310.

[7] Edelmurth *v.* McGarren, 45 How. Pr. 192.

[8] Gibson *v.* Pearsall, 1 E. D. Smith, 90.

buildings to be used for business purposes.[1] Such covenants are intended to prevent injury to other property in the immediate vicinity, whether arising from the encroachment of business generally or from annoyances occasioned by particularly offensive trades.[2] It is perfectly lawful for a lessor to covenant with a lessee that the latter shall not erect houses of certain descriptions, or stores of any kind. That is to say, the restriction may be imposed against particular trades or against business of every character.[3] Such a statement does not conflict with the general doctrine of law, that all contracts or covenants which restrict trade are void as contrary to public policy,[4] for the prohibition is not a general one, and there are numerous weighty reasons why such covenants should be upheld.[5]

As covenants of this description affect the enjoyment of the estate, *they run with the land* and bind the assignee.[6] Where, however, there are restrictive covenants binding the vendor personally only, and it is part of the agreement that the purchaser shall take the land subject to the same restrictions, he should also enter into a covenant with the vendor to abide by the same.[7]

Notwithstanding the fact that it is well settled that no covenant to restrict the beneficial use of premises

[1] Flight *v.* Booth, 1 Bing. N. C. 370, 1 Scott, 190.

[2] Brouwer *v.* Jones, 23 Barb. 153; Hislop *v.* Leckie, L. R. 6 App. Cas. 560.

[3] See Taylor, Landlord and Tenant, § 416.

[4] Rose *v.* Sadgbeer, 21 Wend. 166; Saratoga Co. Bank *v.* King, 44 N. Y. 84.

[5] Chappel *v.* Brockway, 21 Wend. 157; Horner *v.* Graves, 7 Bing. 735; Palmer *v.* Stebbins, 3 Pick. 188.

[6] Mayor *v.* Patteson, 10 East, 136; Brouwer *v.* Jones, 23 Barb. 153.

[7] Moxhay *v.* Inderwick, 1 De G. & S. 708.

will ever be implied,[1] yet, when clearly expressed, such a covenant will be strictly enforced;[2] if necessary, a court of equity will decree an injunction and specific performance.[3]

Thus a covenant to use a building as a private dwelling only is violated by devoting any part of it to business purposes,[4] as where a girls' school was carried on in one of a number of houses leased under such a covenant; although the lessor permitted such a breach in another house of the same row, the court held he did not thereby waive the covenant as to the others.[5] So, again, where a public auction was held on the premises,[6] or a sign, "A. B., Dressmaker," was set up, or "Offices let out."[7] But a "Home for Working Girls," designed for charitable purposes, was held not to be a business within a covenant not to carry on any trade or business of any description;[8] but turning it into a public hotel is so;[9] so, also, selling beer upon the premises.[10]

[1] Doe d. Bish *v.* Keeling, 1 M. & S. 95; Doe *v.* Spry, 1 B. & A. 617; Garnett *v.* Albree, 103 Mass. 372.

[2] Sewell *v.* Taylor, 7 C. B. N. S. 160.

[3] Howard *v.* Ellis, 4 Sandf. 369.

[4] Doe d. Bish *v.* Keeling, 1 M. & S. 95; Wickenden *v.* Webster, 6 E. & B. 387, 25 L. J. Q. B. 264.

[5] Kemp *v.* Sober, 1 Sim. N. S. 517; Johnstone *v.* Hall, 2 K. & G. 414, 25 L. J. Ch. 462.

[6] Sewell *v.* Taylor, 7 C. B. N. S. 160.

[7] Wilkinson *v.* Rogers, 2 De G., J. & S. 62.

[8] Rolls *v.* Miller, L. R. 25 Ch. D. 206, 32 W. R. 806, 27 Ch. D. 71.

[9] Bray *v.* Fogarty, I. R. 4 Eq. 544.

[10] Bishop etc. *v.* Battersby, L. R. 3 Q. B. D. 359. The lessee of a theatre bought an adjoining piece of ground, which was under a covenant that "the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer" should not be carried on there. He erected on this piece of ground a building whose object was to furnish convenient egress from the theatre; but on each floor he set up a counter for selling wine and beer, open only to those who were already in the theatre. Held, that the covenant was violated. Buckle *v.* Fredericks, 44 Ch. D. 244.

It seems that such a covenant is generally restricted to the particular buildings leased, and the tenant may erect others on the same lot for business purposes,[1] but not if the covenant is so framed as to restrain the use of the land as well.[2] In construing covenants which are intended to restrain the erection of houses or buildings for the exercise of an offensive trade or business, much will depend upon the location of the particular property, the neighborhood, and general surroundings.[3] If the covenant simply restricts the tenant from permitting the premises to become a nuisance, a use thereof merely causing an annoyance will not be a breach of the covenant,[4] nor will the business of conducting a hotel,[5] or of a school,[6] or a lunatic asylum,[7] unless particularly objectionable.[8]

§ 149. A permission to use premises for purposes prohibited by a covenant in a building lease may sometimes be implied from the fact of the lessor standing by and knowingly allowing the lessee to expend money in fitting up improvements especially adapted for the trade.[9] Landlords sometimes escape liability for nuisances, as, for instance, offensive trades carried on by their tenants, by the insertion of these restrictive covenants;[10] for, although the lessor is not generally liable

[1] Worsley *v.* Swann, 51 L. J. Ch. 576.

[2] Jay *v.* Richardson, 30 Beav. 563; Clarkson *v.* Edge, 33 Beav. 227.

[3] Guttridge *v.* Munyard, 7 C. & P. 129.

[4] Harrison *v.* Good, L. R. 11 Eq. 338, 19 W. R. 346; Jones *v.* Thorne, 1 B. & C. 715, 3 Dow. & Ry. 152.

[5] Jones *v.* Thorne, *supra.*

[6] Harrison *v.* Good, L. R. 11 Eq. 338, 19 W. R. 346.

[7] Wetherell *v.* Bird, 6 C. & P. 195, 4 Nev. & Man. 285.

[8] Ibid. See, also, Davis *v.* Elsam, Mood. & M. 189; Bish *v.* Keeling, 1 M. & S. 95.

[9] But there must be positive act or knowledge by lessor. Sheppard *v.* Allen, 3 Taunt. 78; Boscawen *v.* Bliss, 4 Taunt. 739.

[10] Rich *v.* Basterfield, 4 C. B. 783; White *v.* Jameson, L. R. 18 Eq. 303, 22 W. R. 761.

for a nuisance created by the act of his tenant, yet, if it results even incidentally from, and is authorized by, a stipulation in the lease, he is also liable for any injury caused thereby.[1]

§ 150. PENAL COVENANTS. Notwithstanding the fact that equity, as has been stated,[2] will generally not enforce penalties, it seems that, where a penal rent is reserved by a lease in the event that the lessee carries on a trade prohibited by another covenant, if the lessor receives the penal rent after knowledge of the breach, he thereby waives his right of reëntry, but if he refuses to accept the penalty he can insist upon forfeiture.[3] Usually an injunction will be granted to prevent a lessee from carrying on a particular trade, although a penalty therefor is provided in the lease;[4] so where the agreement was that the building should not be erected beyond a certain line.[5] Provisos for reëntry and forfeitures inserted in building leases may sometimes be construed as penalties, and equity in such cases generally does not enforce them strictly according to the intention of the parties.[6] Where, however, the meaning is plain, as where the covenant was that

[1] Harris *v.* James, 45 L. J. Q. B. 545.

[2] See *ante*, §§ 58–68.

[3] Weston *v.* Metropolitan Asylum, L. R. 8 Q. B. D. 387, 9 Q. B. D. 404.

[4] Barrett *v.* Blagrave, 5 Ves. 555; Jones *v.* Heavens, L. R. 4 Ch. Div. 636.

[5] Coles *v.* Sims, 5 De G., M. & G. 1, Kay, 56, 23 L. J. Ch. 258. Where a lease provided for a surrender by the lessee of different portions of the premises at different times, and contained a covenant that the lessee should pay $50 a day as stipulated damages for every day he should hold over after the expiration of the lease, it was held that as the provision as to damages was highly penal, and the lease admitted of two constructions as to the time when they would begin to accrue, they would not be considered as commencing until the time when the entire premises were to be surrendered. Klingle *v.* Ritter, 54 Ill. 140.

[6] Woodfall, Leases, 289.

if the lessee did not build a house within a certain time the lessor might reënter,[1] the penal character of the covenant will not defeat it.[2]

§ 151. LESSOR'S TITLE. Independent of covenant, it is well settled that the tenant cannot dispute his landlord's title;[3] and, on the other hand, it is implied by the act of leasing that the lessor has the right to grant the lease.[4] Where, however, the lessee can show that he was induced to accept the lease through the fraud[5] of the pretended landlord, or misrepresentation,[6] or duress,[7] or mistake,[8] or that the relation of landlord and tenant has been dissolved,[9] or that the landlord's title has been judicially declared imperfect,[10] the rule does not apply, and the tenant may set up another title;[11] nor does it extend to the assignee, or one who merely puts a person in possession;[12] but it continues as long as the tenant remains in possession, although his lease

[1] Nash *v.* Birch, 1 M. & W. 402; Doe *v.* Ekins, Ry. & M. 29.

[2] A provision that the tenant, on failing to make certain improvements stipulated for, should forfeit the lease, is a condition allowing reëntry upon breach. Winn *v.* State, 55 Ark. 360, 18 S. W. R. 375.

[3] Stott *v.* Rutherford, 92 U. S. 107; Carter *v.* Marshall, 72 Ill. 609; Camp *v.* Camp, 5 Conn. 300; Rogers *v.* Boynton, 57 Ala. 501; Magill *v.* Hinsdale, 6 Conn. 469; Bertram *v.* Cook, 32 Mich. 518; Burke *v.* Hale, 9 Ark. 328.

[4] Bandy *v.* Cartwright, 8 Ex. 913; Stranks *v.* St. John, L. R. 2 C. P. 376, 36 L. J. C. P. 118, 16 L. T. 283, 15 W. R. 678; but see Kintrea *v.* Preston, 1 H. & K. 357.

[5] Pentz *v.* Kuester, 41 Mo. 447; Miller *v.* McBrier, 14 Serg. & R. 382.

[6] Baskin *v.* Sechrist, 6 Pa. St. 163; Gleen *v.* Rise, 6 Watts, 44.

[7] Gravenor *v.* Woodhouse & Thomas, 1 Bing. 38.

[8] Swift *v.* Dean, 11 Vt. 324; Jackson etc. *v.* Cuerden, 2 Johns. Cas. 353.

[9] Giles *v.* Ebsworth, 10 Md. 333; Bigler *v.* Furman, 58 Barb. 545; Lamson *v.* Clarkson, 113 Mass. 348.

[10] Delaney *v.* Fox, 2 C. B. N. S. 768; Wolf *v.* Johnson, 30 Miss. 513.

[11] Ibid., and Lunsford *v.* Turner, 5 J. J. Marsh. 104.

[12] Franklin *v.* Merida, 35 Cal. 538; Peralta *v.* Ginochio, 47 Cal. 459.

has expired.[1] So, a tenant may dispute his landlord's title, if he has yielded possession in good faith, though without process of law, to one who had actually entered under a paramount title coupled with a present right of entry.[2]

§ 152. Description of Demised Premises. The importance of a correct description of the leased property in the instrument of demise is readily seen from the fact that it is absolutely necessary for the purpose of identification, and there is a well-settled rule that nothing passes but that which is described;[3] although it has been held[4] that a description of premises in a lease, though imperfect, is sufficiently certain if the boundaries of the property can be ascertained, and particularly if actual possession has been taken thereof under the lease.

It may be stated, however, that a lease which fails to describe the premises intended to be demised with a reasonable degree of certainty is void.[5] It is valid, however, whether the property itself is described by metes and bounds, or reference is merely made to something from which the identity can be established.[6] Thus, where a lot was described as "Lot No. 2," but the metes and bounds given were applicable to Lot No. 4, which the lessor did not own, it was held to be valid as a lease of "Lot No. 2;"[7] so of land formerly occupied by Richard Roe, and known as "Warrenton;" or that

[1] Miller *v.* Long, 99 Mass. 13; Teller *v.* Eckert, 4 How. 295.

[2] Camp *v.* Scott, 47 Conn. 369; Carson *v.* Crigler, 9 Brad. (Ill.) 83.

[3] Woods, Landlord and Tenant, 300.

[4] Pierce *v.* Minturn, 1 Cal. 470; De Rutte *et al. v.* Muldrow *et al.*, 16 Cal. 505.

[5] Dingman *v.* Kelly, 7 Ind. 717, 2 Preston Conveyancing, 451; Pick *v.* Williams, 10 N. Y. 509; Pierce *v.* Minturn, 1 Cal. 470.

[6] Camley *v.* Stanfield, 10 Tex. 546; Vose *v.* Bradstreet, 27 Me. 156.

[7] Lusk *v.* Druse, 4 Wend. 313.

which was obtained from John Doe, etc.[1] The description of the premises demised, in a lease required by the Statute of Frauds to be in writing, cannot be supplied by parol evidence, but a mere ambiguity may be explained and the land identified.[2]

In building leases and agreements for leases, the lots or parcels of land are frequently described by reference to certain schedules or plans of the proposed undertaking. While this method is found to be convenient, it is not always reliable, for slight errors in drawings or measurements may cause serious complications;[3] and it will always be well not to rely solely upon the plan, but to have also another description of the premises leased.[4]

Although it is well settled that, where the description in a lease clearly designates a piece or parcel of land as that demised, it cannot be varied by parol evidence,[5] yet, where land is leased for building by reference to plans which are incorrect, the court may consider whether the lessee was misled by the plans,[6] and in such a case refuse to enforce the contract.[7]

As we have said before, the land must be described with a reasonable degree of certainty, or the lease is void;[8] but it is immaterial whether the certainty is in

[1] 2 Platt Leases, 28.

[2] Guy *v.* Barnes, 29 Ind. 103.

[3] Emden on Building, 94.

[4] See Ibid. for illustration of error in plans.

[5] Emeric *v.* Kohler, 29 Barb. 165.

[6] Fewster *v.* Turner, 6 Jur. 144, 11 L. J. Ch. 161; Gibson *v.* D'Este, 2 Y. & C. C. C. 542.

[7] Weston *v.* Bird, 2 W. R. 145; Denny *v.* Hancock, L. R. 10 Ch. Ap. 1; Dykes *v.* Blake, 4 Bing. N. C. 463.

[8] *Supra*, citing 2 Preston Conveyancing, 451; Peck *v.* Williams, 10 N. Y. 509; Dingham *v.* Kelly, 7 Ind. 717. A lease describing premises as "commencing on the west line of the land owned by the Alton Manufacturing Co., where the same intersects the county road, and running thence

the deed, or in some other deed or plan to which it refers.[1] The mere reference to a plan, however, is not a warranty of the sufficiency of the plan, or that all the ground therein exhibited is leased;[2] it may have been, in fact generally is, intended simply as explanatory of the description contained in the lease,[3] and it is well settled that, where the first words of the instrument of demise are sufficiently certain in themselves, additional words of erroneous description will not vitiate the lease.[4] It sometimes happens, however, that the plan is distinctly and expressly made a part of the agreement.[5]

Parol evidence is admissible for the purpose of identifying a plan when the lease or agreement expressly refers thereto,[6] but the evidence must be such as to leave no doubt of the fact before specific performance can be decreed.[7]

To illustrate the effect of incomplete description, it may be well to show what property passes in certain cases. Thus, a lease of land will carry with it *all* the buildings affixed to it, the same being part of the free-

eastwardly on the north line of said road 200 feet, and extending back or north of equal width," is a good and sufficient description. Coppinger v. Armstrong, 5 Brad. 637.

[1] 1 Preston Conveyancing, 184; 2 Preston Conveyancing, 448, 461; Pegram v. Newman, 54 Mass. 612, Shep. Touch. 244.

[2] Squires v. Campbell, 1 Myl. & C. 459; Nurse v. Lord Seymour, 13 Beav. 269; Eastwood v. Lever, 4 De G., J. & S. 114.

[3] Clarke v. M. S. & L. Ry. Co., 1 J. & H. 631; Nicholson v. Rose, 4 De G. & J. 10.

[4] Jackson v. Delaney, 11 Johns. 365; Vose v. Bradstreet, 27 Me. 156; Banks v. Ammons, 27 Pa. St. 172.

[5] Rankin v. Huskisson, 4 Sim. 15; Slee v. Corporation, 4 Giff. 262.

[6] Hodges v. Horsfall, 1 R. & My. 116; Minley v. McDermott, 3 N. & P. 356, 8 A. & E. 138.

[7] Ibid.

hold;[1] so the lease of a house, without other description, will include all the land which is covered thereby,[2] but no more than is necessary to enjoyment of the house,[3] and not adjoining buildings, although necessary and used with the house described.[4] The doors, windows, sashes, locks, keys, bolts, and all fixtures pass with a lease of a house, although not in their proper places at the time of the demise;[5] not, however, unless they have been previously annexed to the freehold, for materials collected for building purposes do not pass until actually used.[6] But improvements or additions to buildings instantly become, upon erection, part and parcel of the premises.[7]

§ 153. Decisions on the Sufficiency of Descriptions. A deed bounding land on a way shown on a plan, which is referred to in the deed, and afterwards recorded by the grantor, estops him and those claiming under him from obstructing the land granted.[8] So, also, where land has been sold at auction by reference to a plan,[9] or where a plan showed a private way which was not defined in the deed,[10] it estops the grantor; but a mere reference to a plan in the descriptive part of a deed does not import a stipulation by the grantor that the plan shall not, in any respect, be subsequently

[1] Hay *v.* Cumberland, 25 Barb. 594 (in this case a farm-house was specified, but the lease was held to carry all other buildings on the land).

[2] Sherman *v.* Wilkins, 113 Mass. 481.

[3] Bennett *v.* Bittle, 4 Rawle, 399.

[4] Ogden *v.* Jennings, 62 N. Y. 53.

[5] Chamber's Reports, 300; Spies *v.* Damm, 54 How. Pr. 293.

[6] Beard *v.* Durald, 22 La. An. 284.

[7] Hoby *v.* Roebuck, 7 Taunt. 157, 2 Marsh. 433.

[8] Rodgers *v.* Parker, 9 Gray, 445.

[9] Ibid., and particularly Farnsworth *v.* Taylor, 9 Gray, 162.

[10] Fox *v.* Union Sugar Refinery, 109 Mass. 242; Baxter *v.* Arnold, 114 Mass. 577.

changed in parts not adjacent to the land sold.[1] So a restriction that no building shall be placed upon a parcel of land within a certain distance of the street refers to the street as existing at the time of the restriction imposed, and not to the street as subsequently altered by public authority.[2]

Matters of description do not amount to a covenant where such is not the intention of the parties.[3]

§ 154. PRIVILEGE OF PURCHASING. Where a lease gives the lessee the privilege of purchasing the land, during the lease, at its value, in preference to others, the privilege is as much a term of the contract, and as binding on the lessor, as any other term of the instrument; and though the lessee is not bound to purchase, and the lessor's contract may amount only to a proposition until accepted by the lessee, yet upon his acceptance it becomes a valid agreement; and the lessee has an equity against the lessor to have the lease executed.[4]

Existence of the Option. In *Byers* v. *Denver Circle R. Co.*,[5] the land-owner agreed to sell the land to the rail-

[1] Coolidge *v.* Dexter, 129 Mass. 167.

[2] Tobey *v.* Moore, 130 Mass. 448.

[3] Howard *v.* Rogers, 4 H. & J. 278.

[4] De Rutte *et al. v.* Muldrow *et al.*, 16 Cal. 505. Yet in a Massachusetts case, where a clause in a lease stipulated that the lessor should have the right to sell the demised premises at any time covered by the lease, by giving the lessee two months' notice and the privilege of purchasing at the price offered, it was held that the clause was not restrictive, and a sale of the premises subject to the lease, without notice or proffer to the lessee, was not a breach entitling him to an action. O'Callaghan *v.* Hawkes, 121 Mass. 298.

A lease provided that the lessor should have the right to sell at any time, the lessee having priority and being entitled to buy on the same terms as any third person. Held, that the lessee, on a bill for performance filed against the lessor and his vendee, could not compel a transfer. Hayes *v.* O'Brien (Ill.), 26 N. E. R. 601; Fogg *v.* Price, 145 Mass. 513.

[5] 13 Colo. 552, 22 Pac. R. 951.

road company for $200 if the road was constructed and trains run within one year, and in the mean time allowed the company to enter for construction purposes. The road being built and trains run, the company was held entitled to performance on paying the $200.[1]

Where the lease gave the lessee the right of purchase at a given price, and the lessee entered and made improvements, he was granted a conveyance as against one who purchased the land with knowledge of the facts.[2]

Failure to Exercise Option in Proper Mode. In a lease dated March 24, 1882, and providing that the lessee should hold for the term of twenty years and two months from March 1, 1882, there was an option of purchasing "at any time within five years from the commencement of this demise;" it was held that the period for the option expired March 1, 1887.[3]

[1] In Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. R. 900, where the defendant, to induce the erection of buildings on his land, promised to convey to each person having erected such improvements the land occupied by the improvements, it was held that the uncertainty was too great to permit the enforcement of specific performance.

[2] Page *v.* Martin, 46 N. J. Eq. 585, 20 Atl. R. 46. A contract of lease by which the lessor agrees to convey the land at the expiration of the term is not void for want of mutuality because it is signed by the lessor only, and it may be specifically enforced. Davis *v.* Robert, 89 Ala. 402, 8 So. R. 114. In Schields *v.* Harbach, 28 Neb. 359, 44 N. W. R. 465, it was held upon the facts that the lessee was entitled to claim a conveyance under the terms of the lease.

[3] Keyport etc. Co. *v.* Lorillard (N. J.), 19 Atl. R. 381. In Harding *v.* Gibbs, 125 Ill. 85, the lessee had the option of purchase for $9,500 at any time within the first year, the lessee to decide within ten days after notice. Held, that a decision to purchase communicated before the end of the year, but more than ten days after notice, was not a sufficient exercise of the option. Where the lease gave the lessee the privilege of purchase at the expiration of the term, a tender of the purchase-money two years thereafter was held not sufficient. Kruegel *v.* Berry, 75 Tex. 230, 9 S. W. R. 863.

Where a lessee had the option of purchase on giving written notice "to the lessors or the survivors or survivor of them, or the executors," etc., it was held that notice to one only of the three lessor-trustees, all three being alive, was insufficient.[1]

Forfeiture of Option. Where a lease gives the lessee power to purchase, and also allows the lessor to forfeit for non-payment of rent, the power of purchase is not lost by mere non-payment of rent, nor until the lessor declares a forfeiture.[2]

§ 155. COVENANTS TO PAY FOR IMPROVEMENTS. We come now to consider those covenants of frequent occurrence whereby the landlord encourages the tenant to build by binding himself to pay for the buildings erected, or other improvements put upon the land. Such a covenant means that the lessor will pay for all the improvements that are left upon the land when the term expires, and does not give the tenant a right to recover for such improvements as have been made, but destroyed or removed during the term;[3] nor for ordinary repairs put upon the building;[4] nor for improvements of a kind different from those specified in the lease: so where a lessee was to erect fire-proof buildings, and

[1] Sutcliffe *v.* Wardle, 63 Law T. 329.

[2] Gradle *v.* Warner (Ill.), 29 N. E. R. 1118. Where a purchaser agreed to erect one house within four months and another within a year, and he was notified to quit before the first period had expired, and was shortly afterwards sued in ejectment, it was held that the failure to build the second house within the year did not deprive him of the right to relief. Powell *v.* Higley, 90 Ala. 103, 7 So. R. 440. Where a bond for a deed recited that the making of certain improvements within six months was the principal consideration for the sale, and that a failure to erect would cause forfeiture, inexcusable neglect to make the improvements within two years was held a defence to a bill for specific performance. Haggerty *v.* Eylton Land Co., 89 Ala. 428, 7 So. R. 651.

[3] Van Rensselaer *v.* Penniman, 6 Wend. 569.

[4] Lamette *v.* Anderson, 6 Cow. 302.

those put up were not fire-proof,[1] or where the building did not in another respect comply with the description.[2]

Paying for Improvements. The lessor is liable for improvements only where he has agreed to pay for them; and the mere fact that he has known of their making, and has not objected, is not sufficient.[3]

Conditions Precedent. A claim on a covenant by the landlord to pay for improvements cannot be set up by a tenant who has defaulted in his rent, and is sued for the arrears after eviction.[4] A lease contained a covenant by the lessee to erect a building, either the building to be appraised at the end of the term and the lessee to have half the value, or the lease to be renewed; in case of non-payment of rent the lessors were entitled to enter the premises and resume possession. It was held that the successors of the lessee, who was evicted for non-payment, could not recover for one half the value of the buildings.[5] In *Finkelmeier* v. *Bates*,[6] where the facts were very similar, the court assumed the validity of the tenant's contention that payment of rent was not a condition precedent to the covenant to give one half the value of the building, but decided that the latter covenant to pay "at the expiration of the term" could not be set up by the

[1] Fisher *v.* Fisher, 1 Bradf. 335.

[2] Ostrander *v.* Livingston, 3 Barb. Ch. 414.

[3] Gocio *v.* Day, 51 Ark. 46. Where the lessor agreed to buy, at the end of a five years' lease, a house to be erected on the premises by the lessee, provided the lease was not then renewed, and before expiration the parties agreed to renew for one year, "with all conditions unchanged and unimpaired," held that the lessee could not exact payment for the house. Kash *v.* Huncheon, 1 Ind. App. 361, 27 N. E. R. 645.

[4] Glaser *v.* Cumiskey, 16 N. Y. Suppl. 89.

[5] Bates *v.* Johnston, 58 Hun, 528.

[6] 92 N. Y. 172.

tenant before its expiration as the basis of a counter-claim in a suit by the landlord against the evicted tenant for arrears of rent.

Valuation. Where a lessor promised to purchase improvements on expiration of the lease at their then value, it was held that the proper test of value was not the original cost, less the depreciation by use, but the value at the expiration of the term.[1] Where the lease provides for the appointment of appraisers to value the permanent improvements to be paid for by the lessor, the appraisement is not an arbitration, and notice to the parties of the meeting is not necessary.[2] If the covenant stipulates that the landlord shall either renew the lease or pay for the improvements, and the tenant refuses to accept a renewal of the lease upon any terms, the landlord can retain the improvements without reimbursing the tenant for them:[3] the landlord can recover possession after tendering a lease.[4]

[1] Edwards *v.* Van Patten, 46 Kan. 509, 26 Pac. R. 958.

[2] Pearson *v.* Sanderson, 128 Ill. 88, 21 N. E. R. 200; Cal. M. E. Church *v.* Seitz, 74 Cal. 287, 15 Pac. R. 839. Where the lessor is to take the improvements, etc., at the expiration of the lease, at a valuation to be fixed by arbitrators, it is not necessary that the lessee should formally tender the improvements, etc. W. S. Quarry Co. *v.* B. & D. Stone Co. (Ky.), 17 S. W. R. 162. Where the improvements are to be taken by the lessor at a valuation by arbitrators, it is not sufficient for the lessor to offer to submit if the award is made subject to the approval of the probate court. Nichols *v.* Sargent, 125 Ill. 309, 17 N. E. R. 475.

Lien. A covenant by the lessor to pay for improvements does not create a lien upon the property. N. Y. Dyeing etc. Establishment *v.* De Westenbery, 46 Hun, 281.

Tenant paying for Improvements. In Welcome *v.* Hess, 90 Cal. 507, 27 Pac. R. 369, the landlord built a store-room for the tenant, to be paid for out of the rents. Held, that after accepting a surrender of the lease he could not recover the cost of the erection.

[3] Rutgers *v.* Hunter, 6 Johns. Ch. N. Y. 215; Pike *v.* Butler, 4 N. Y. 360.

[4] Pearce *v.* Colden, 8 Barb. 322. Covenants to pay for improvements run with the land. Mathiott *et al. v.* Howard *et al.*, 34 Md. 121.

It seems that a lessee can obtain specific performance of a covenant to pay for improvements, and convey the property to him at the end of the term upon the payment of a certain sum.[1]

The nature of the improvements must be fairly inferred from the covenant of the lease. A California case, though the circumstances are somewhat peculiar, may serve to illustrate this statement. A lease of a lot in San Francisco stipulated that the lessee should place on the premises a building 30 by 80 feet, which had been shipped, etc.; that, if no agreement was made between the parties, the valuation of the *buildings* should be made by three disinterested persons, and the lessors should pay the lessee the amount by them agreed upon. The lessee erected a building worth $1,000, which was destroyed, and then another, and subsequently sublet the premises to the plaintiff, who put up a building costing $50,000, the defendants notifying him before building that they would not pay for it. It was held, at the expiration of the lease, that the defendants were not bound to pay for the plaintiff's building; that the term *buildings*, though in the plural, referred only to the building mentioned in the forepart of the lease, and not to any buildings the lessee might erect, especially when the conduct of the parties, the nature of the transaction, and the surrounding circumstances are considered.[2]

[1] Ostrander *v.* Livingston, 3 Barb. Ch. 416; Van Horne *v.* Crain, 1 Paige Ch. 455. As to the right to remove building improvements, see the next chapter.

[2] Woodward *v.* Payne & Dewey, 16 Cal. 445. A lease stipulated that the tenant should erect a house upon the premises, for which he should, upon the expiration of the lease, be paid a sum to be fixed by arbitration. The landlord, during the existence of the tenancy, sold the land and assigned the lease. It was held that the *covenant to purchase ran with the*

§ 156. TAXES, ASSESSMENTS, ETC. A tenant is not bound, by virtue of his relation to his landlord, to see that the taxes assessed upon the land are paid;[1] for, where the lease is silent upon the subject, the law imposes the duty upon the landlord to see to the payment of all city and county taxes, ground-rents, and assessments.[2] So, if the land is offered for sale for the non-payment of such incumbrances, the tenant may become the purchaser, and set up, against his landlord, the title so acquired.[3] It should be distinctly understood that the nature of the tenancy referred to in this section is that for years, the interest of a tenant for life being liable for taxes, etc., during his term.[4]

Besides taxes, there are frequently other expenses imposed by local authorities during the progress of the work, such as those arising from compliance with town ordinances, — connecting with sewers, paving, drains, licenses, and sanitary regulations, for all of which the owner of the land will generally be liable, in the absence of an express covenant to the contrary. It is competent, however, to shift these responsibilities by a covenant in the lease, and the construction of such covenant will be according to the meaning reasonably implied from the words used.[5] It seems, however, that a

land, and was binding upon the grantee. Frederick *v.* Callahan, 40 Iowa, 311. For covenants to permit the removal of improvements, see the next chapter.

[1] Ferguson *v.* Etter, 21 Ark. 160.

[2] Taylor *v.* Zamira, 6 Taunt. 524; McFarlane *v.* Williams, 107 Ill. 33. But not on improvements made by the lessee. Leach *v.* Goode, 19 Mo. 501.

[3] Ferguson *v.* Etter, 21 Ark. 160.

[4] Prettyman *v.* Walston, 34 Ill. 191.

[5] Watson *v.* Home, 7 B. & C. 285; Palmer *v.* Earith, 14 M. & W. 428; 2 Platt on Leases, 69 *et seq.*; Whitfield *v.* Brandwood, 2 Stark. 440. Where a lease had a condition that, "if default shall be made in any of the covenants contained therein on the part of the lessee, then such lease shall be deemed forfeited, and it shall be lawful for the lessor to reënter said

lessee's covenant, "to pay all taxes or duties levied or to be levied" on the premises during the term, does not bind him to pay for paving a sidewalk required by a statute.[1]

Where a lessor covenanted to pay all taxes, assessments, etc., it was held that he was not entitled to a proportionate return of taxes paid by him to the lessee, although the building was destroyed by fire after the payment, and during the year for which they were paid.[2]

It is sometimes difficult to proportion the rate of liability when improvements have been made subsequent to the covenant. But where a landlord expressly covenants to pay all taxes charged or chargeable upon or in respect of the land during the continuance of the term, and gives the lessee permission to build on the land, the landlord will be bound to pay only the amount of the taxes of the land without the buildings or other improvements placed thereon by the tenant.[3] So, where a lessee increased the taxable basis of land from that of £60 to £300 per annum, it was held that he could deduct only the sewer-rate and the land-tax upon the original rent, and not in respect of the improved value.[4] So, where the lessee improved land

premises and remove all persons therefrom," and one of the covenants on the part of the lessee required him to pay all taxes against the premises, and he failed to pay the same, it was held that the lessor could not take advantage of the breach of such covenant to forfeit the lease, without first demanding of the lessee payment of such taxes. Meni *v.* Rathbone, 21 Ind. 454.

[1] Twycross *v.* F. R. R., 10 Gray, 293.

[2] Wood *v.* Bogle, 115 Mass. 30; Minot *v.* Joy, 118 Mass. 308.

[3] Watson *v.* Home, 7 B. & C. 285; Taylor, Landlord and Tenant, § 342.

[4] Smith *v.* Humble, 15 C. B. 221; Watson *v.* Home, 7 B. & C. 285; Watson *v.* Atkins, 3 B. & Ald. 647.

without the consent of the lessor, it was held that the lessor was not liable for the improved value.[1]

The true test of the lessor's liability is the amount of rent received by him, without reference to other considerations of the lease; the landlord being generally bound to pay such proportion of the land-tax as the reserved rent bears to the total value of the premises demised.[2]

"If a lease containing a covenant for the payment by the lessee of all taxes assessed is assigned without any covenant on this subject, the assignee is liable to his assignor for the amount of taxes accruing during his term and paid by the assignor, but is not liable for taxes accruing after he has parted with his possession by assigning the lease to another."[3] Covenants to pay rent and taxes run with the land.[4]

[1] Hyde *v.* Hill, 3 T. R. 377.
[2] Ward *v.* Const, 10 B. & C. 635, 5 M. & R. 402.
[3] Mason *v.* Smith, 131 Mass. 516.
[4] Lester *v.* Hardesty, 29 Md. 59.

CHAPTER XIX.

FIXTURES.

§ 157. Fixtures Generally. It is often a matter of great importance at the expiration of a leasehold estate to determine whether various additions and improvements made by the lessee during his term belong to him or his landlord. The difficulty generally arises in reference to a class of property called *fixtures*, which occupy so nearly a middle place between realty and personalty that it is hard to determine to which they belong.[1] The old English rule, that all chattels fixed to the freehold instantly became part thereof,[2] has become very much relaxed in favor of tenants making improvements for their personal comfort, or for business purposes, during their tenancy.[3] Indeed, it may now be stated as a general rule, in determining whether articles attached or accessory to the use of a building, or to the land, are fixtures, that the court will give great weight to the actual or presumed intention of the parties in erecting the structure, and will not merely consider the manner in which the improvement is attached to the realty, but will judge from its surroundings, its uses, and the purposes for which it was made; holding that only those chattels become real which are annexed to the freehold under circumstances indicating that they were intended as a permanent

[1] Walker's Amer. Law, 305; 1 Washb. Real Property, 9–11.

[2] Broom's Maxims, 295 *et seq.*

[3] Elwes *v.* Maw, 3 East, 38; Van Ness *v.* Packard, 2 Pet. 137.

annexation.[1] Another general rule may be stated, that whatever a tenant affixes to leased property may be removed by him during his tenancy, provided the same can be done without injury to the freehold.[2] It does not affect the rule whether the improvements were annexed for personal comfort, or for trade or manufacture,[3] or that ownership of the freehold has changed hands.[4] But the tenant must remove his property before the expiration of his term, or (if annexed to) it becomes instantly a part of the realty, and he cannot then take it away.[5]

§ 158. BUILDINGS AS FIXTURES. There is possibly not a better illustration of a fixture than a building. Ordinarily it is erected upon and firmly annexed to the land, and, being of a permanent and generally immovable nature, it is *primâ facie* part of the realty.[6] The ownership in property left upon premises by a tenant is in the landlord.[7] So, if a tenant contracts to erect a building upon the premises, and at the expiration of the term to surrender the premises in as good condition as reasonable wear and tear will permit, and with no reservation to remove the buildings by him erected, such buildings belong to the lessor at the end of the term.[8] There can be no doubt that, if such a fixture were left by the lessee upon the demised premises, it

[1] Chapman *v.* Union M. L. Co. 4 Brad. (Ill.) 29; Jones *v.* Ramsey, 3 Brad. 303.

[2] Washb. Real Property, 11; Walker's Amer. Law, 306.

[3] Mason *v.* Fenn, 13 Ill. 529.

[4] Raymond *v.* White, 7 Cowen, 319.

[5] Davis *v.* Moss, 38 Pa. St. 346, 353; Lee *v.* Risdon, 7 Taunt. 188; Gaffield *v.* Hapgood, 17 Pick. 192.

[6] Cochran *v.* Van Surley, 20 Wend. 368; 2 Smith, Lead. Cas. 168.

[7] Kutter *v.* Smith, 2 Wall. 491; Lawrence *v.* Knight, 11 Cal. 208; Smith *v.* Brown, 5 Rich. Eq. 291.

[8] May *v.* Hamilton etc., 10 Bosw. 537; Mayor *v.* Brooklyn, 41 Barb. 231.

would become a part of the realty.[1] Yet a building may be personalty under certain circumstances. Thus, a house erected by a builder with his own means for his own purposes, in pursuance of an understanding with the owner of the land;[2] so, also, a temporary building erected for the purposes of trade with the intention of removing it;[3] so, also, any building put upon the land with an agreement for its removal;[4] so, also, a wooden structure unlawfully erected within the city limits;[5] and in other similar cases buildings may be regarded as personal property which may be removed by the owner thereof, or sold in execution against him, and at his death pass to his personal representatives.[6] Indeed, it seems that a building put up with an understanding for its removal can be taken away after the death of either party, if done within a reasonable time.[7]

In an Illinois case the court held that a house built upon one lot and then removed to another was personal property while in transit, but realty after it became permanently attached to the lot to which it had been removed.[8] So where a mortgagor, whilst the owner of the equity of redemption, erected a house upon the mortgaged premises without any agreement with the mortgagee, the house became part of the realty and passed to the purchaser upon foreclosure.[9]

[1] Raymond *v.* White, 7 Cow. 319; Corporation of New Orleans *v.* Winter, 1 Wheat. 91; Gaffield *v.* Hapgood, 17 Pick. 192.

[2] Chatterton *v.* Saul, 16 Ill. 151; Goff *v.* O'Connor, 16 Ill. 421; Dooley *v.* Crist, 25 Ill. 551.

[3] Sagar *v.* Eckert, 3 Brad. 412.

[4] Matson *v.* Griffin, 78 Ill. 477.

[5] Hine *v.* New Haven, 40 Conn. 484.

[6] Chatterton *v.* Saul, 16 Ill. 151; Goff *v.* O'Connor, 16 Ill. 421.

[7] Sagar *v.* Eckert, 3 Brad. 412.

[8] Salter *v.* Sample, 71 Ill. 430.

[9] Matson *v.* Griffin, 78 Ill. 477. "A building upon blocks, rollers, stilts, or pillars; or a varnish-house upon a wooden plate resting on brickwork,

§ 159. Instances of Articles Judicially Declared to be Fixtures. While stoves[1] put up in a building are personalty, a furnace placed in a building to remain there permanently is a fixture, and consequently realty.[2] Bricks, as soon as they are placed in a wall, become attached to the freehold, and if they are removed from the wall, unless for the purpose of being replaced by better material by the person who put them there, they belong to the proprietor of the land.[3] So where a building was burned and the owner afterwards *verbally* sold the brick, of which some had been severed by fire, but the greater part remained in the walls, it was held that the brick in the walls was within the Statute of Frauds.[4] A dye-kettle set in brick;[5] a cotton-gin;[6] a hot-house used by a florist;[7] stationary engines in a colliery;[8] the permanent stage of a theatre, but not the movable scenery and flies;[9] and other articles absolutely necessary to the use and enjoyment of the land, such as doors, windows, locks, keys, millstones, — have been regarded as so constructively annexed, whether on the land or not, as to pass to the purchaser;[10] a pump inserted in a well;[11] machinery

the quarters being mortised into the plate; or a post windmill laid across traces not attached to the ground," — is not a fixture, but a mere chattel. 1 Hilliard's Abr. R. P. 12. See, further, § 160, as to the right to remove.

[1] Blethen *v.* Towles, 40 Me. 310; Folsom *v.* Moore, 19 Me. 252.

[2] Thillman *v.* Carr, 75 Ill. 385.

[3] Moore *v.* Cunningham, 23 Ill. 328.

[4] Meyers *v.* Schemp, 67 Ill. 469.

[5] Noble *v.* Bosworth, 19 Pick. 314; Union Bank *v.* Emerson, 15 Mass. 159.

[6] Bratton *v.* Clawson, 2 Strobh. 478.

[7] Panton *v.* Robert, 2 East, 88.

[8] Lawton *v.* Lawton, 3 Atk. 13; Ford *v.* Cobb, 20 N. Y. 344.

[9] The Olympic Theatre Case etc., 2 Browne (Pa.), 285.

[10] Liford's Case, 11 Co. 51; Le Roy *v.* Platt, 4 Paige, 77; Farrar *v.* Stackpole, 6 Greenl. 154; Phillipson *v.* Mullanphy, 1 Mo. 620.

[11] McCracken *v.* Hall, 7 Ind. 268.

put in a mill to supply the place of that worn out;[1] a carding machine in a factory;[2] a bell in a church steeple;[3] rails laid in a fence,[4] although fence not staked;[5] articles attached to a building for manufacturing purposes;[6] a steam-engine in a tan-yard;[7] a wooden cistern;[8] a marine railway;[9] a clapboard machine;[10] nursery trees;[11] pews in a church;[12] a fire-frame inlaid with bricks;[13] sinks nailed down;[14] gas-pipes;[15] gas-fixtures, mirrors, drinking-bar, counters, etc.;[16] platform scales;[17] a wooden building affixed to the ground by numerous iron bolts;[18] a wooden ice-house;[19] a bowling-alley;[20] a counting-room frame-work;[21] a bake-house.[22]

The Iowa court was equally divided whether a store-

[1] Bowen *v.* Wood, 35 Ind. 268.
[2] Taffee *v.* Warwicke, 3 Blackf. 111.
[3] Congregational Society *v.* Fleming, 11 Iowa, 533.
[4] Boon *v.* Orr, 4 G. Gr. 304.
[5] Smith *v.* Fairall, 4 G. Gr. 146.
[6] Milliken *v.* Armstrong, 17 Ind. 456.
[7] Sparks *v.* State Bank, 7 Blackf. 469.
[8] Blethen *v.* Towles, 40 Me. 310, 4 Gray, 256.
[9] Strickland *v.* Parker, 54 Me. 263. But not rails temporarily laid. Fifield *v.* M. C. R. R. 62 Me. 77.
[10] Trull *v.* Fuller, 28 Me. 545.
[11] Price *v.* Brayton, 19 Iowa, 309. Not manure. Lassell *v.* Reed, 6 Me. 222.
[12] Gay *v.* Baker, 17 Mass. 438; Daniel *v.* Wood, 1 Pick. 102.
[13] Gaffield *v.* Hapgood, 17 Pick. 192.
[14] Walls *v.* Hinds, 4 Gray, 256.
[15] Ibid.
[16] Jones *v.* Guthrie, 108 Mass. 191. Not a large, heavy zinc box, so large as to have to be taken to pieces before removed. Park *v.* Baker, 7 Allen, 78.
[17] Bliss *v.* Whiting, 9 Allen, 114.
[18] Talbott *v.* Whipple, 14 Allen, 177.
[19] Antoni *v.* Belknap, 102 Mass. 193.
[20] Hanrahan *v.* O'Reilly, 102 Mass. 201.
[21] Brown *v.* Wallis, 115 Mass. 156.
[22] Korbe *v.* Barbour, 130 Mass. 255.

house, consisting of a balloon frame set upon posts implanted in the ground, was a fixture or personalty.[1] There is great diversity in judicial opinion upon many of these articles: thus, while in Indiana,[2] Iowa,[3] Maine,[4] Pennsylvania,[5] New Hampshire,[6] and other States,[7] machinery in mills is held as fixtures, the New York,[8] Ohio,[9] Illinois,[10] Massachusetts,[11] and Vermont[12] courts have declared otherwise. For after all, in determining whether an article is a fixture or personal property, the controlling consideration is the intention of the party making the improvements, and the fact of physical attachment is of importance only as showing such intention.[13] Even in those rare cases where trade fixtures have become part of the realty, if the same were erected with an implied license from the owner, equity will not treat them as part of the realty in the hands of a purchaser having notice.[14]

A hydraulic press;[15] sheds upon posts set in ground;[16] pipes for conducting water;[17] whiskey stills;[18] kettle in a tannery;[19] pumps, cisterns, iron gratings and doors,

[1] Cowen *v.* St. John, 16 Iowa, 590.
[2] McCracken *v.* Hall, 7 Ind. 268; Bowen *v.* Wood, 35 Ind. 268.
[3] Ottumwa W. M. Co. *v.* Hawley, 44 Iowa, 57.
[4] Corlis *v.* McLogin, 29 Me. 115.
[5] Harland *v.* Harland, 15 Pa. St. 513.
[6] Burnside *v.* Fritchell, 43 N. H. 390.
[7] See Voorhies *v.* Freeman, 2 Watts & Serg. 116.
[8] Potter *v.* Cromwell, 40 N. Y. 287.
[9] Teaff *v.* Hewett, 1 Ohio, 511.
[10] Walker *v.* Sherman, 5 Ill. 527.
[11] Gale *v.* Ward, 14 Mass. 352.
[12] Hill *v.* Wentworth, 28 Vt. 428.
[13] Ottumwa W. N. Co. *v.* Hawley, 44 Iowa, 57.
[14] Wilgin *et al. v.* Getting *et al.*, 21 Iowa, 178.
[15] Finney *v.* Watkins, 13 Mo. 291.
[16] Beckwith *v.* Boyce, 9 Mo. 560.
[17] Rogers *v.* Crow, 40 Mo. 91.
[18] Burk *v.* Baxter, 3 Mo. 207.
[19] Hunt *v.* Mullanphy, 1 Mo. 508. A building once affixed to the free-

distillery and horse mills, are all fixtures; but not joists, vats, buckets, pickets, and faucets not fixed to the freehold.[1] The road-bed of a railroad and the rails thereon may be trade fixtures.[2]

§ 160. REMOVAL OF FIXTURES.[3] The general rule is, that tenants have no right to remove buildings or other fixtures erected by them, after a forfeiture or reëntry.[4] So where a landlord agreed to allow his

hold cannot become a chattel by mere agreement. Aldrich *v.* Husband, 131 Mass. 480.

[1] Kirwin *v.* Latour, 1 H. & J. (Md.) 289.

[2] N. C. R. R. Co. *v.* Canton Co., 30 Md. 347.

[3] See, also, *ante*, §§ 155, 158.

[4] Whipley *v.* Dewey, 8 Cal. 36. In Miller *v.* Waddingham, 91 Cal. 377, 27 Pac. R. 750, the plaintiff had placed his vendee in possession of land, retaining the title as security for the purchase-money. The vendee built houses and sold them, and it was held that the buyer would not be enjoined from removing them, the security not being shown to be impaired thereby.

Covenants that the Lessor should retain Improvements. In the following cases parol evidence was held not admissible to contradict a provision that improvements made on the leased premises should become the lessor's: Walsh *v.* Martin, 69 Mich. 29, 37 N. W. R. 40; Tait's Ex'r *v.* Cent. Lunatic Asylum, 84 Va. 271, 4 S. E. R. 697. Under a clause providing that "all improvements placed in said building, viz., elevators, boilers, heating apparatus, etc.," should be irremovable by the tenant on departure, it was held that the term "improvements" was limited to the classes of articles enumerated, and that "etc." included only articles directly connected with the specified ones. Loeser *v.* Liebmann, 14 N. Y. Suppl. 589. Under a provision in the lease of a store-room that all improvements shall belong to the landlord at the expiration of the term, shelves, counters, a furnace, and removable awnings pass to the landlord. Parker *v.* Wulstein, 48 N. J. Eq. 94, 21 Atl. R. 623. Where a building was leased for a skating rink and bicycle hall, all improvements to belong to the lessor, an additional wood floor laid down by the lessee was held an improvement. Harris *v.* Kelly (Pa.), 13 Atl. R. 523.

Covenant that the Lessee may Remove. Where a lease permitted the lessees to build, with privilege of removal if rent was fully paid at expiration of the term, the lessor's conduct in renewing the lease with full knowledge of certain arrears was held a waiver of the breach of condition. Lewis *v.* Ocean etc. Co., 3 N. Y. Suppl. 911. Covenants that the lessee shall pay taxes, and that the lessor shall permit the removal of the lessee's improve-

tenant a reasonable time after the expiration of his lease to remove his buildings, and the tenant surrendered or forfeited his lease before the expiration thereof, the intention of the parties was held to be confined to its legal expiration, and not to the wrongful act of the lessee in terminating it, and therefore the lessee could claim no right under the contract. And there is no obligation under such circumstances sufficient as a consideration to support a subsequent promise of the landlord.[1]

In *Curtis* v. *Hoyt*,[2] a leading Connecticut case on this subject, a building was removed from its site and rendered uninhabitable by a stranger. The tenants abandoned the premises. The court held that the building was personal property; that its materials reverted to the owner thereof, and that he could maintain trespass for the injury; that, although the owner had rented out most of the building to tenants, he still retained the general possession of the building. In another case a tenant for years took down an old shop on the premises and erected a new one in which to carry on his trade, using in the construction some of the materials of the old shop. It was held that his right to remove the new shop depended on the question whether it was essentially a distinct building from the other, or merely the old one repaired or reconstructed, and from this may be inferred his right to pull down buildings erected by him during his term.[3]

ments, are independent, and the latter may be enforced without showing performance of the former. Strohmeyer *v.* Zeppenfeld, 28 Mo. App. 268.

[1] Whipley *v.* Dewey, 8 Cal. 36.

[2] 19 Conn. 165.

[3] Beers *v.* St. John, 16 Conn. 329. So, whether a brick store erected on leased ground was removable during the term was held to be dependent upon the intention of the lessee, and how it was attached to the freehold. Linahan *v.* Burr, 41 Conn. 473. So, where H erected a wooden

A tenant erected on leased premises a wooden dwelling-house, two stories high, with a shed of one story, having a cellar of stone or brick foundation, and a brick chimney, for his business as a dairyman, and the residence of his family: it was held that he might remove the entire structure during his term.[1] So, again, a carpenter was allowed to remove his shop.[2] But where a stranger erects buildings on the land of another they become part of it, and cannot be removed.[3] Yet, if he builds upon the land of another, honestly supposing it to be his own, and the real owner of the land stands by and does not object, equity will not allow him to profit by the mistake; but if the stranger knows that the land upon which he is building does not belong to him, the owner of the land may assert his legal rights and take the benefit of the expenditure.[4] If the owner of a lot consents to another building thereupon without any terms being agreed upon, the presumption will be that the building becomes part of the freehold, and the owner thereof is to pay a reasonable price for it.[5]

To determine whether certain property is or is not a fixture, the declaration of the party who erected it

barn upon stone piers, on a lot which he had leased to P, under a parol agreement that P should pay an additional sum as rent for the barn, and should have it for a certain sum whenever H should sell the lot. H sold to S by an absolute deed, but the barn was verbally excepted from the conveyance. S then conveyed the barn by an absolute deed to L, a *bonâ fide* purchaser for value without notice. Held, that aside from the original agreement the barn had been a fixture from the first, and that the agreement could not operate against L. London *v.* Platt, 34 Conn. 522, 524.

[1] Van Ness *v.* Packard, 2 Pet. 137.

[2] Kelly *v.* Austin, 46 Ill. 156.

[3] Dooley *v.* Crist, 25 Ill. 551.

[4] Emerson *v.* W. V. R. R. Co., 75 Ill. 176.

[5] Dunsledter *v.* Dunsledter, 77 Ill. 580.

is admissible.[1] If he intended that it should be permanent, so it will remain, unless severed by removal or an executed agreement for that purpose.[2] And such declarations of a lessee are admissible if against the assignee of the lease.[3]

The general rule is, that a tenant may remove fixtures put upon land if the same can be done without injury to the freehold:[4] the right must be exercised during his term, or he becomes a trespasser.[5] The only real exception is that, if the person erecting the improvements be a mere tenant at will, or for an uncertain period, he will be allowed a reasonable time after the expiration of his tenancy.[6] But it has been held that the right to remove improvements on expiration of a lease involves the right of access (but not of possession) for a reasonable time after its expiration.[7] Where a lessee has the right to erect houses and to remove them at the expiration of the term, the mere fact that the houses remain on the land after the term, pending litigation for possession, does not forfeit the privilege.[8]

A lease contained a provision that the tenant might remove all his improvements at the expiration of the lease, if all arrears of rent were fully paid, and the other conditions of the lease fully complied with. The

[1] O'Kane *v.* Treat, 25 Ill. 557; Linahan *v.* Burr, 41 Conn. 473.

[2] Ibid.

[3] Linahan *v.* Burr, 41 Conn. 473.

[4] Allen *v.* Kennedy, 40 Ind. 142; Cronne *et al. v.* Hoover, 40 Ind. 49; Sullivan *v.* Carberry, 67 Me. 531; Dingley *v.* Buffington, 57 Me. 381.

[5] Cases last cited. See McIvers *v.* Estabrook, 134 Mass. 550, for apparent exception, where it was implied that tenants at will waived the right to remove. See, also, Madigan *v.* McCarthy, 108 Mass. 376.

[6] Sullivan *v.* Carberry, 67 Me. 531.

[7] Caperton *v.* Stege (Ky.), 15 S. W. R. 870.

[8] Atkison *v.* Dixon, 96 Mo. 588, 10 S. W. R. 162.

tenant subsequently erected a frame building resting on posts; the builder put a mechanic's lien upon it, foreclosed the same, and was about to remove the structure during the lease, and while the tenant's rent was still in arrear. Upon a bill for injunction filed by the landlord, it was held that the builder could only remove the building on the same terms as the tenant himself.[1]

As we have already said, a building erected upon the land of another, with the consent of the land-owner, with the builder's own means, is personal property,[2] and can be treated as such; thus, an action of replevin will lie at the instance of the owner for recovery of such a building from the land-owner.[3] So, also, of trover.[4]

Where a lessor gave a lessee a permit authorizing him to erect a building upon his leased land, and allowing him to take it away or sell it upon the ground, it was held that such a permit limited the right to take away the building, but not to sell it, and that a purchaser thereof might take it away after the term for which the lease was originally given.[5]

If, however, a husband, voluntarily and without any contract, erects buildings upon his wife's land, he cannot remove them, nor can *his* administrator sell them to pay his debts: they become part of the realty.[6]

[1] Oswald *v.* Buckholtz, 13 Iowa, 506.

[2] Curtis *v.* Hoyt, 19 Conn. 165; Fuller *v.* Taylor, 39 Me. 519, 2 Amer. Lead. Cas. 693; District Township *v.* Moorehead, 43 Iowa, 466.

[3] District Township *v.* Moorehead, 43 Iowa, 466, and cases *supra*.

[4] Osgood *v.* Howard, 6 Me. 452; Hilborne *v.* Brown, 12 Me. 162; Bonney *v.* Foss, 62 Me. 240.

[5] Adams *v.* Goddard, 48 Me. 212 (an interesting case on various points).

[6] Washburn *v.* Sproat, 16 Mass. 449. This is an exception to the rule that where there is an agreement, express or implied, and property is annexed, it shall remain what the parties intended, although actually

A building without underpinning, standing on wooden blocks, is personal property.[1] So, also, is a small house placed on another's land without cellar, chimney, or plastering, and intended to be taken apart in sections.[2]

attached to the freehold. O'Donnell *v.* Hitchcock, 118 Mass. 401; Doty *v.* Gorham, 5 Pick. 487; Hartwell *v.* Kelly, 117 Mass. 235.

[1] Hinckley *v.* Baxter, 13 Allen, 139.

[2] O'Donnell *v.* Hitchcock, 118 Mass. 401. So is a building erected by an individual upon government land. Marcy *v.* Darling, 8 Pick. 283.

PART III.

EASEMENTS RELATING TO BUILDINGS.

CHAPTER XX.

PRINCIPLES OF LAW OF EASEMENTS.

§ 161. GENERAL STATEMENT. It is not within the scope of this treatise to enter into detailed consideration of the law of easements and servitudes, except so far as to present briefly a general view of these incorporeal rights, and to dwell specially upon those directly affecting buildings and building operations. The object of this chapter is to sketch an outline of the whole subject, in order to elucidate more clearly the important questions arising as to the use of party-walls, right of lateral and subjacent support, light, and air.

§ 162. NATURE OF EASEMENTS. An easement is an incorporeal right or privilege which one proprietor has over the property of another.[1] As defined by Chancellor Kent, it is "a liberty, privilege, or advantage without profit, which one proprietor has in the estate of another proprietor, distinct from the ownership of the soil." The terms "easement" and "servitude" are used synonymously. An easement is distinguished from a license in that it implies an interest in land, while a license carries no such interest, and may be

[1] Ritger *v.* Parker, 8 Cush. 145; Brakely *v.* Sharp, 1 Stockt. 9.

revoked at any time.[1] The right to an easement may be acquired in various ways. It may be granted expressly by deed, as where one land-owner covenants to allow another the enjoyment of certain privileges over his land; or it may be gained by prescription, as where one has enjoyed the right of way unmolested for a certain period;[2] or it may be implied from necessity, as where one purchases land so hemmed in that access cannot be gained without crossing the land of the vendor.[3] An easement cannot be granted by any one having less than an entire interest in the land.[4] Thus, one of a number of tenants in common cannot create an easement to the detriment of the other tenants,[5] nor can a co-proprietor.[6] Yet either may acquire an easement over other land, which will operate as a benefit to the other co-tenant or co-proprietor.[7] This corresponds with the case of minors and married women, who, owing to legal disabilities, cannot grant easements, but yet can acquire them in favor of their estates.[8]

When an estate is assigned, or passes by devise, all things connected with it, easements included, pass with the title, provided they are necessary to a proper

[1] See distinction discussed, Washb. on Easements, 5, 19.

[2] 3 Kent Com. 441.

[3] Carbrey *v.* Willis, 7 Allen, 364; Abbott *v.* Stewardstown, 47 N. H. 228. See § 213, *infra*.

[4] Washb. on Easements, 29; 3 Kent Com. 436; Portmore *v.* Bunn, 3 Dowl. & R. 145. Where the lessee of land owned the building thereon, with the right of removal in case the lessor failed to buy at expiration of the term, it was held that the lessee's interest in the land and building was sufficient to allow him to grant an easement in the building. Newhoff *v.* Mayo, 48 N. J. Eq. 619, 23 Atl. R. 265.

[5] Collins *v.* Prentice, 15 Conn. 423; Watkins *v.* Peck, 13 N. H. 360, 381.

[6] Portmore *v.* Bunn, 3 Dowl. & R. 145.

[7] Bartlett *v.* Harlow, 12 Mass. 348; Varnum *v.* Abbott, 12 Mass. 474.

[8] Washb. on Easements, 30.

enjoyment of the land.[1] Thus, where one owns two dwelling-houses, and disposes of one of them, which cannot be used without passing through the passage-way of the other, the right to use the passageway is of necessity, and an incident to the grant of the house.[2]

§ 163. PRESCRIPTION. Easements may be acquired by immemorial or long-continued enjoyment: this mode of gaining the right is called prescription. The period of uninterrupted enjoyment necessary to gain an easement is sometimes fixed by statute, but now the term of twenty years is usually considered sufficient.[3] The right arises from the presumption of a grant from long-continued usage. A *custom* differs from a prescription in that it is a local usage not accruing to a particular person, being the means by which the public may acquire the prescriptive right by long enjoyment.[4] The principles of law governing easements are similar, in many respects, to those governing the acquisition of title to the land itself by adverse possession. The following rules are applicable to both: —

A title to an easement may be acquired by enjoyment only when the possession or enjoyment has been, —

1st. Under claim of right.

2d. Open, uninterrupted, and undisputed.

3d. For twenty successive years (or the statutory period, as the case may be).

[1] Hinchcliffe *v.* Kinnoul, 5 Bing. N. C. 1.

[2] See 2 Washb. Real Property, 32; Hills *v.* Miller, 3 Paige, 254; § 213, *infra*.

[3] 1 Greenl. Ev. § 17; Linnett *v.* Wilson, 3 Bing. 115; Sargeant *v.* Ballard, 9 Pick. 251, 255.

[4] Perley *v.* Langley, 7 N. H. 233; Curtis *v.* Keesler, 14 Barb. 511; Lade *v.* Shepherd, 2 Strange, 1004; Cincinnati *v.* White, 6 Peters, 431. See further of the distinction, Washb. Easements, 77 *et seq.*

4th. The easement must have been enjoyed in the same degree, and to the same extent, as claimed in the suit involving it.[1]

§ 164. EXTINCTION OR LOSS OF EASEMENTS. It is clearly settled that, while an incorporeal right may be acquired by adverse enjoyment, it may also be lost by a discontinuance of the enjoyment. This may happen in all cases, unless there be some act indicating an intention to resume the enjoyment within a reasonable time.[2] So we find that not only an express release of an easement will destroy it,[3] but that failing to use it for a long space of time will be a strong fact to show intention to abandon the right; and so the cessation of use, coupled with an act clearly indicative of an intention to abandon, will operate as a release.[4]

An easement may be extinguished by,—

1. An actual or constructive release.[5]

2. The right to the collateral thing, and an estate in the land itself, coming into the same hands.[6]

In such cases the easement is lost, or merged into the ownership of the fee. But it is held that the estate in the land cannot be less, in quantity and dura-

[1] Postlethwaite *v.* Payne, 8 Ind. 104. "To establish an easement by prescription there must be clear, definite, and unequivocal proof of a continued user with the acquiescence of the owner of the land for a period of twenty-one years." Jones *v.* Crow, 32 Pa. St. 398.

[2] Moore *v.* Ranson, 3 B. & C. 332, 3 L. J. K. B. 32. See Pickard *v.* Bailey *et al.*, 26 N. H. 165.

[3] Glenn *v.* Davis etc., 35 Md. 208.

[4] Glenn *v.* Davis, *supra;* Brown *v.* Trustees, 37 Md. 108. The dominant owner was held to have abandoned his easement where he used for several years a new and convenient way substituted for the original one by the servient owner, who had built upon and obstructed the original way. Fitzpatrick *v.* B. & M. R. Co., 84 Me. 33, 24 Atl. R. 432. Cf., also, Green *v.* Richmond (Mass.), 29 N. E. R. 770.

[5] Washb. Easements, 516.

[6] Challis, Real Prop. 62.

tion, than the estate in the easement; for if the estate in the land should be less, or if it should be defeasible, the collateral thing will be only *suspended* during the continuance of the estate in the land, and will be revived upon the determination or defeasance of the latter.[1] Yet it may be generally stated that, if "the owner of one of the estates, whether dominant or servient, becomes the owner of the other, the servitude which one owes to the other is merged in such ownership and thereby extinguished."[2] It virtually amounts to this: that no man can have an easement in his own land.[3]

3. An easement arising out of *necessity* may be extinguished by becoming *unnecessary*.[4]

Such an easement may, however, be revived.[5]

4. Abandonment, or non-use.

5. Executed license.

If the owner of the easement authorizes the owner of the land to do certain acts which prevent the former from any longer enjoying the easement, the effect will be to extinguish it.[6]

§ 165. LICENSE DISTINGUISHED FROM EASEMENT. It is important to distinguish readily an easement arising from an express grant and a mere license. An easement cannot be created save by deed or prescription, but parol licenses are revocable, although executed by the licensee.[7] So, although an easement may be im-

[1] Co. Lit. 313, a, b.

[2] Washb. Easements, 517, citing Pardessus, Traité des Servitudes, 411.

[3] Ibid., citing Hancock v. Wentworth, 5 Met. 446; Gayetty v. Bethune, 14 Mass. 53, 55; Keiffer v. Imhoff, 26 Pa. St. 438.

[4] Grant v. Chase, 17 Mass. 443, 445.

[5] Pomfret v. Ricroft, 1 Wms. Saund. 323, n. 6.

[6] Washb. Easements, 560; Hewlins v. Shippam, 5 Barn. & Cr. 221.

[7] Cook v. Stearns, 11 Mass. 533; Morse v. Copeland, 2 Gray, 302; Stewart v. Stevens, 10 Colo. 440, 15 Pac. R. 786. In Hodgkins v. Farring-

paired or destroyed by a parol license, it cannot be created thereby.[1] While an easement always implies an interest in the lands in or over which it is enjoyed, a license does not carry with it such an interest.[2] Again, a license may be revocable at will by the land-owner, while an easement may be a freehold and irrevocable.[3]

§ 166. ENFORCING EASEMENTS. Injuries to the proper enjoyment of easements, like injuries to other species of property, have appropriate remedies at law and in equity. Generally, to recover at law, actual damage must be shown to have been sustained by the plaintiff; yet, if his right is clearly shown, the law may presume damage to have resulted from the wrongful act of the defendant, and, by a rendition of judgment therefor, establish the plaintiff's right, and protect it from interruption.[4] An action upon the case for a nuisance may be brought where the plaintiff seeks to recover for consequential damages to an easement; an action for trespass will not lie.[5] Ejectment cannot be maintained against one claiming an easement in a parcel of land.[6]

ton, 150 Mass. 19, 22 N. E. R. 73, oral permission to let timbers into a wall as a support for a building was held to be a revocable license.

[1] Lane *v.* Miller, 27 Ind. 534.

[2] Washb. Easements, 5.

[3] Wolfe *v.* Frost, 4 Sandf. Ch. 72. A simple or voluntary license is merely authority, without regard or consideration to a particular act or series of acts on another's land, without passing any interest or estate in the same, and need not be in writing. Winn *v.* Garland, 19 Ark. 23. Such a license is revocable at the pleasure of the grantor, but its revocation will not be allowed, where the grantee has been induced to expend his money towards its enjoyment, without reimbursing him. But an easement is a liberty, privilege, or advantage which one man may have in lands of another without profit, and must be held under a deed, or some other instrument in writing, or by prescription. Ibid.

[4] Ashby *v.* White, 2 Lord Raym. 939; Woodman *v.* Tufts, 9 N. H. 88; Tillotson *v.* Smith, 32 N. H. 90.

[5] Baer *v.* Martin, 6 Blackf. 317.

[6] Child *v.* Chappell, 6 Seld. 246, 251.

Where the land-owner has destroyed the easement, as, for instance, fills up the well from which the right to draw water existed, or erects buildings over it so that it cannot be reached, and then conveys it to a stranger, the latter will not be liable to the owner of the land for the loss of the easement.[1] It is gone before he became owner.[2]

A more adequate remedy, however, is generally to be had in courts of equity. For, where easements or servitudes are annexed by grant or covenants or otherwise to private estates, the due enjoyment of them will be protected against encroachments by injunction.[3] Thus, where one builds so near the house of another as to darken his window-lights, courts of equity may interfere to prevent the nuisance, as well as to remedy it if already done, although an action for damages would lie at law.[4]

Such an interference, however, will not be interposed to aid an individual to sustain his right to enjoy a public easement, when the injury of which he complains affects the whole community.[5] But in cases of private nuisances, equity courts have concurrent jurisdiction with those of law.[6] Whether an injunction will be granted is largely within the sound discretion of the court.[7]

§ 167. Estoppel. If the owner of land subject to an easement expends large sums in erecting buildings

[1] Washb. Easements, 572.

[2] Ballard *v.* Butler, 30 Me. 94.

[3] Thurston *v.* Minke & Humbird, 32 Md. 487.

[4] 2 Story Eq. Juris. Redf. ed. §§ 925, 926.

[5] 2 Story Eq. Juris. Redf. ed. § 927; Hartshorn *v.* South Reading, 3 Allen, 501; Brainard *v.* Conn. Riv. R. R. Co., 7 Cush. 506.

[6] Gardner *v.* Newburg, 2 Johns. Ch. 162; Van Bergen *v.* Van Bergen, 2 Johns. 162.

[7] Williams *v.* Jersey, 1 Craig & P. 91; 2 Story Eq. Juris. § 959 a.

which interfere with such easement, with the knowledge of, and without objection from, the party entitled to it, the latter will be estopped from afterwards disputing the right of the former to enjoy such improvements.[1]

§ 168. CONVEYANCE OF AN EASEMENT. An easement may pass, without express mention, as an incident to the grant of the adjacent premises; but the fee in one piece of land not mentioned in the deed will not pass as appurtenant to another tract granted by an accurate description giving it a definite and limited boundary.[2] Nothing passes as an incident to such a grant but what is requisite to its fair and reasonable enjoyment. The fee in the land still remains in the grantor, and he may use the same and appropriate it to such purpose as he pleases consistent with the grantee's easement.[3]

[1] Mitchell *v.* Leavitt, 30 Conn. 590.

[2] Gebhardt *v.* Reeves, 75 Ill. 301.

[3] Bakeman *v.* Talbot, 31 N. Y. 366; Houps *v.* Alden, 22 Iowa, 160; Amondson *v.* Severson, 37 Iowa, 602.

CHAPTER XXI.

LIGHT AND AIR.

§ 169. General Rule. The mere ownership of property does not involve, as a natural right or as an easement, the privilege of receiving light and air through or over adjacent land. Hence no action lies for the cutting off of light and air, in the absence of any specific easement founded on prescription or grant.[1]

§ 170. Acquisition by Prescription. In England the old doctrine was, that a party could not maintain an action for a nuisance to an ancient light unless he had gained a right to the window by prescription;[2] but this has been so modified that, upon proof of adverse enjoyment of lights for more than twenty years, a jury may presume a right by grant or otherwise.[3]

The modern English law on this subject is not favorably received in this country.[4] The doctrine recognized in England is, that if A build a house on the edge of his ground, with windows looking into B's field or

[1] Mahan *v.* Brown, 13 Wend. 216; Pickard *v.* Collins, 23 Barb. 44. But in Appeal of Morgan (Pa.), 19 Atl. R. 628, proof of a purpose to annoy the plaintiff in building a twelve-foot fence within four feet of the plaintiff's house, so as to obstruct light and air, was held sufficient to justify a decree for its removal. *Accord*, Burke *v.* Smith, 69 Mich. 380, 37 N. W. R. 838.

[2] Kirby *v.* Eccles, 1 Leon. 188; Bury *v.* Pope, Cro. Eliz. 118.

[3] Yard *v.* Ford, 2 Saund. 175 a; Tapling *v.* Jones, 11 H. L. C. 290, 20 C. B. (N. S.) 166, 34 L. J. C. P. 342; Truscott *v.* Merchant Tailors' Co., 11 Ex. 855; Turner *v.* Spooner, 1 Dr. & Sm. 467, 9 W. R. 684.

[4] Myers *v.* Gemmell, 10 Barb. 537; Palmer *v.* Wetmore, 2 Sandf. 316; Ray *v.* Lynes, 10 Ala. 63.

garden which is adjacent, B may next day, or at any time within twenty years, run up a house or wall shutting out the light entirely from A's windows; but if B allows A's house to stand twenty years without building, he is forever prevented from building on his own land so as to darken A's lights, for A then acquires a prescriptive right to an easement over B's lands. In some cases (but not generally) the doctrine has been carried so far as to hold that a person could gain a servitude, not only of light, but also of prospect.[1] In Scotland, however, it has almost invariably been held that B may, after twenty years, or at any other period, build on his own land and darken A's windows, provided he do not act maliciously. In the United States, courts have time and again declared the English doctrine to be untenable. It seems, in fact, that such an anomaly of the law could not be applied to the growing cities and towns of this country without most mischievous consequences.[2] In many States it is well settled that an easement in light and air cannot be gained by prescription;[3] while in others

[1] A distinction is recognized in England between easements of light and those of air, the former being regulated by the Prescription Act (2 & 3 Wm. IV. ch. 71, § 3), while the latter are dependent upon common law. Injuries resulting from polluting the air by offensive trades are treated in works upon nuisances; and for all practical purposes the text of this chapter will be equally applicable to both light and air.

[2] Parker *v.* Foote, 19 Wend. 316; Myers *v.* Gemmell, 10 Barb. 537; Klein *v.* Gehrung, 25 Tex. Supp. 240; Ray *v.* Lynes, 10 Ala. 63.

[3] Hiett *v.* Morris, 10 Ohio St. 523; Mullen *v.* Stricker, 21 Ohio St. 139; Richardson *v.* Pond, 15 Gray, 387. See, also, Ward *v.* Neal, 35 Ala. 602; Hubbard *v.* Town, 33 Vt. 295; Guest *v.* Reynolds, 68 Ill. 78; Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. R. 503; Stein *v.* Houck, 56 Ind. 65; Pierre *v.* Fernald, 26 Me. 436; Cherry *v.* Stein, 11 Md. 1, overruling Wright *v.* Freeman, 1 H. & J. 447; Mullen *v.* Stricker, 19 Ohio St. 135; Hiett *v.* Morris, 10 Ohio St. 523; Ingraham *v.* Hutchinson, 2 Conn. 584; Haverstick *v.* Sipe, 33 Pa. St. 368 (*semble*). See, also, for Pennsylvania, 17 Pa. St. 222; Hay *v.* Sterrett, 2 Watts, 331.

an implied grant of an easement of light will be sustained only in cases of real *necessity*, and will be denied or rejected in cases where it appears that the owner claiming the easement can, at a reasonable cost, have or substitute lights to the building.[1] Disputes as to the right to light and air generally arise in growing cities and towns between owners of adjoining houses, for such easements can be claimed only as appurtenant to buildings. To uphold the English doctrine, that the occupants of houses in cities are entitled to the same privilege of unimpaired enjoyment of ancient lights,[2] would be to check most effectually all building operations. Air and light are not, properly speaking, subject to ownership, and the enjoyment thereof is adverse to no one. It is a hardship to allow an adjacent owner to deprive his neighbor thereof by erecting a wall upon his land, perchance for the mere purpose of shutting out the light from his neighbor's windows. On the other hand, it is well settled that one landholder has an equal right with the other to determine when, how, and what he shall build upon his own land, and that if his neighbor wants light he must so construct the building that light can be had independently of the condition of adjoining property.

It is exceedingly doubtful whether the easement of light can be acquired by a period of enjoyment through the mere acquiescence of the owner of the servient estate. Even the English cases justify the statement that mere acquiescence is not sufficient; there must be some act or conduct on the part of the owner of the land to show consent to the easement, and the burden of proof lies on the claimant of the right to

[1] Powell *v.* Sims, 5 W. Va. 1.

[2] Yates *v.* Jack, L. R. 1 Ch. 295; Martin *v.* Headon, L. R. 2 Eq. 425.

show such consent.[1] Enjoyment for the period of prescription against a tenant will not bind the reversioner.[2]

But in some States the English doctrine of acquisition by prescription is accepted. In New Jersey the court will interfere by injunction to prevent the obstruction of ancient lights, which "must not be disturbed after having existed for twenty years undisturbed, particularly by the person who built the house containing the ancient lights."[3] The same rule obtains in Louisiana,[4] and probably in Alabama.[5] In South Carolina an action lies against the owner of adjoining soil for obstructing lights of which there has been uninterrupted enjoyment for more than twenty years;[6] yet, in the case of a window overlooking adjacent house and land, which gave no right of action to the owner of the space overlooked, he was held not bound to obstruct the light coming to his neighbor across his land within twenty years to prevent acquiescence of right.[7]

§ 171. GRANT BY IMPLICATION. In Maine it has been held that "if one sell a building, the light necessary to the reasonable enjoyment of it coming across the

[1] Dunn *v.* Spurrier, 7 Ves. 235; Davies *v.* Sear, L. R. 7 Eq. 427; Cotching *v.* Bassett, 32 Beav. 101. The easement of light and air through windows cannot be acquired by prescription against an adjacent owner, unless he becomes an owner in common of the wall, because until then he has no power to close the window. Oldstein *v.* Building Ass'n, 44 La. Ann. 492, 10 So. R. 928.

[2] Shelf. Real Property Stat. 98; Baker *v.* Richardson, 4 Barn. & Ald. 578; Daniel *v.* North, 11 East, 372.

[3] Robeson *v.* Pettenger, 1 Gr. Ch. 57; Barnett *v.* Johnson, 2 McCart. Ch. (N. J.) 481. See, also, King *v.* Miller, 4 Halst. Ch. (N. J.) 559; Bechtel *v.* Carslake, 3 Stock. 500.

[4] Durel *v.* Boisblanc, 1 La. Ann. 407.

[5] Ray *v.* Lynes, 10 Ala. 63; Ward *v.* Neal, 35 Ala. 602.

[6] McCready *v.* Thomson, Dudley (S. C.), 131.

[7] Napier *v.* Bulwinkle, 5 Rich. (S. C.) 312.

grantor's adjoining land goes with it, as incident to the grant, but not that which would be a convenience simply without being a necessity."[1] A similar implication is made in Maryland.[2] But it is generally held that a conveyance of a tenement with windows overlooking a vacant lot owned by the grantor creates no easement therein for light and air as against a subsequent purchaser.[3] There were early decisions to the contrary; thus, in Massachusetts, in the case of *Story* v. *Odin*, the court held that after the grant without any reservation of a right to build on adjacent ground, or to stop the lights in the building sold, the grantor could neither darken the lights by building upon the adjoining lot, nor authorize a purchaser to do so.[4] But this decision was overruled in *Keats* v. *Hugo*,[5] where the court declared, after discussing at length the previous Massachusetts cases, that "the grant of an easement of light and air is not implied from the conveyance of a house having windows overlooking land retained by the grantor." In another case, where two lots belonging to the same owner were sold at auction on the same day, "with the privileges and appurtenances" belonging to each, the court held that the purchaser of the lot on which the building stood acquired no right of light and air over the other lot, though the sale and conveyance to him respectively preceded the sale and conveyance to the other.[6] In *Carrig* v. *Dee*,[7] the fact

[1] White *v.* Bradley, 66 Me. 254; see Herrick *v.* Marshall, 66 Me. 435.

[2] Cherry *v.* Stein, 11 Md. 1, overruling Wright *v.* Freeman, 5 H. & J. 477.

[3] Shipman *v.* Beers, 2 Abb. N. C. 435; Myers *v.* Gemmell, 10 Barb. 537.

[4] Story *v.* Odin, 12 Mass. 157; Grant *v.* Chase, 17 Mass. 443; Roswell *v.* Pryor, 12 Mass. 9; Fifty Associates *v.* Tudor, 6 Gray, 255.

[5] Keats *v.* Hugo, 115 Mass. 204.

[6] Collier *v.* Pierce, 7 Gray, 18; Johnson *v.* Jordan, 2 Met. 234. *Contra*, Fifty Associates *v.* Tudor, 6 Gray, 255; Back *v.* Stacey, 2 Carr. & P. 465.

[7] Carrig *v.* Dee, 14 Gray, 583. But see Havens *v.* Klein, 51 How. Pr. 82.

that windows on hinges swung outwards over the defendant's land was held not to constitute such adverse possession as to make any difference.

In Ohio, when the owner of two adjoining lots conveys one of them, no grant or reservation for light and air will be implied merely from the nature or use of the structures existing upon the lots at or prior to the time of conveyance.[1] In Pennsylvania, where two houses belonging to the same owner were sold at public auction under a power in a will, and in the one last sold were windows overlooking the other property, the court held that no easement for light was thereby created, and that the property first sold did not become servient to the other in this respect.[2] So, where the owner of two adjoining tenements sold to different vendees, no easement for light and air was created.[3] In a later case it was declared that such a conveyance does not create an easement for light and air, unless such windows be a real necessity for the enjoyment of the property granted.[4]

A single illustration will be sufficient to show that the American courts are not inclined to uphold the English view that a clause in a building agreement or lease not to obstruct ancient lights should be construed as a grant of the easement of light to such windows over land of the lessor.[5] In a Maryland case the owner in fee of two lots leased one of them to B for the renewable term of ninety-nine years, and in the lease

[1] Hiett *v.* Morris, 10 Ohio St. 523, citing 1 Best & Smith, 571, 16 M. & W. 463, 33 Pa. St. 368.

[2] Maynard *v.* Esher, 17 Pa. St. 222; Haslett *v.* Powell, 30 Pa. St. 293.

[3] Haverstick *v.* Sipe, 33 Pa. St. 368; King *v.* Large, 27 Leg. Int. 148.

[4] Rennyson's Appeal, 94 Pa. St. 147.

[5] Lowe *v.* Innes, 10 Jur. (N. S.) 1037; Davies *v.* Marshall, 1 Dr. & Sm. 557.

covenanted that the lessee should have the right and privilege to make openings and place lights in the wall which he contemplated erecting on the western line of the property leased. After the wall was erected and the windows placed in position, overlooking the west lot, A conveyed the reversion in the east lot to B in fee by deed. After this conveyance in fee to B, A conveyed to C in fee the west lot. C began to build up to or near the easternmost line of his lot, the effect of which would have been to obstruct the light and air from B's windows. C was notified, and an action was brought on the covenant against A for this supposed breach of warranty, the breach alleged being the existence of the windows in B's house. The court emphatically rejected the English doctrine as inapplicable to this country, and held that the common proprietor conveyed the right, and that the relative rights and incidents of the two tenements were fixed at the time of the severance by the first grant, and, unless restrictive words were used, the easement followed, and that the warranty did not make A liable to the purchaser.[1]

Express grants of the easement are almost unknown; but in *Hagerty* v. *Lee*,[2] a deed reserved the right to light and air, and was held to establish such an easement.

§ 172. Grant or Warranty by Implication in Leases. It has been held in Pennsylvania that the erection of a party-wall by a third party, obstructing the windows of a tenant, does not amount to an eviction.[3] But in New York the contrary appears to be the rule; for a demise of a building having windows overlooking a

[1] Cherry *v.* Stein, 11 Md. 1; Jane *v.* Jenkins, 34 Md. 1.
[2] 45 N. J. Eq. 1, 15 Atl. R. 399.
[3] Hazlett *v.* Powell, 30 Pa. St. 293.

vacant lot owned by the lessor was construed as conferring the right to have such windows unobstructed during the term.[1] Yet in another case it was held that a landlord could lawfully build upon his adjoining house, though he thereby darkened and obstructed the windows of the demised premises.[2] A lease with a covenant for quiet enjoyment confers on the tenant only the ordinary right to light as it existed at the time of lease.[3]

§ 173. OBSTRUCTIONS BY LESSEES. It has been almost conclusively settled that, in case of premises demised adjoining that of the owner, the lessee has no right to obstruct the lights in the other tenement.[4]

§ 174. INCIDENTAL AND ABSOLUTE RIGHTS. It has generally been held that the owners of property adjacent to a highway have a right to receive therefrom light and air.[5] While equity will not generally interfere to prevent trivial obstructions,[6] yet any positive interference with the plaintiff's rights will be enjoined. Thus, equity restrained a canal company from erecting a building over their canal which would have shut out the complainant's windows from facing the canal.[7]

The right to use the air for the purpose of running a windmill may be acquired like any other easement.[8]

[1] Doyle *v.* Lord, 64 N. Y. 432; Spies *v.* Damm, 54 N. Y. 293.

[2] Myers *v.* Gemmell, 10 Barb. 537.

[3] Riviere *v.* Bower, Ry. & M. 24.

[4] Leech *v.* Schweder, L. R. 9 Ch. 463, 43 L. J. Ch. 487, 30 L. T. 586.

[5] Barnett *v.* Johnson, 2 McCart. Ch. (N. J.) 481.

[6] Atty. Gen. *v.* Heishon, 3 C. E. Gr. 410, 413; Shreve *v.* Voorhies, 2 Gr. Ch. 25. In Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. R. 746, a brick wall of a certain height and nearness was declared as matter of law to be an obstruction.

[7] Plum *v.* Morris Canal Co., 2 Stock. 256. *Accord*, Hagerty *v.* Lee, 45 N. J. Eq. 1, 15 Atl. R. 399.

[8] Goodman *v.* Gore, 2 Rolle Abr. 704. But see Webb *v.* Bird, 10 C. B. N. S. 269. Where the cellar of the plaintiff's house had for forty years been

Occupants of dwelling-houses have an absolute right freely to enjoy pure air, and he who corrupts or pollutes it is liable to an action for maintaining a nuisance. "A conveyed to B land, and a new house thereon, bounding said land on the estate of D. B's administrator conveyed to D, reserving to the house of B the right of eaves-drops where it bounded on said lot, and also the right of forever keeping open the staircase window at the back of said house, bounding on said lot," the window being twenty-five inches distant from the line of D's land. Held, that the reservation in the deed of the right to keep open the window was merely a right then existing, to wit, the right to light and air coming from the space of twenty-five inches between the window and the line of D's land, as it stood before the deed was given.[1]

§ 175. Extent of the Right. The extent of the right to light and air, once gained as an easement, depends upon the same rules as other easements. That is to say, it is proportionate to the actual and necessary enjoyment by the user during the prescription period as defined by the grant.[2] Such a right may extend to the proper use and enjoyment of the building, as necessary to adapt it to the use of the occupant.[3] It is also set-

ventilated, to the knowledge of the adjacent owner, by a shaft running to a disused well on his premises, the plaintiff was held to have acquired an easement to the passage of air from the cellar to the well. Bass *v.* Gregory, 25 Q. B. D. 481.

[1] Dyer *v.* Sanford, 9 Met. 395. Entries, stairways, and skylights made by the owner in fee during the unity of seizin, which are apparent and continuous, and necessary to the reasonable enjoyment of the several parts of the building, will be easements upon severance of title to different parts of the building. Morrison *v.* King, 62 Ill. 30.

[2] Lanfranchi *v.* Mackenzie, L. R. 4 Eq. 421, 16 L. T. 114; Younge *v.* Shaper, 21 W. R. 135; Kelk *v.* Pearson, L. R. 6 Ch. 809.

[3] Yates *v.* Jack, L. R. 1 Ch. 295; Martin *v.* Headon, L. R. 2 Eq. 425, 35 L. J. Ch. 602.

tled that the dominant owner may enlarge his ancient lights without sacrificing his easement to the extent of his acquired rights,[1] yet any substantial alteration in the plan of windows destroys the easement.[2] While "the dominant owner cannot acquire any new or additional right to light by enlarging the dimensions or increasing the number of windows, he may alter or improve them in any way he desires, to obtain a larger amount of light through the ancient windows."[3] It seems in this country that the grantee of an easement to light has the right to the open and unobstructed passage of air from the ground upwards, and throughout the length of the passageway.[4]

Although a grantee is restricted by a covenant from making "any addition to his building" northwardly, he may always raise his building higher, though by so doing he obstructs the free access of light and air to the windows of the grantor's house.[5]

§ 176. Loss of the Right. If the owner of an easement of light and air permits other permanent erections which substantially intercept it, the easement is thereby extinguished.[6] So, also, if he who enjoys the

[1] Ecclesiastical Com. v. Kino, L. R. 14 Ch. D. 213, 49 L. J. Ch. 529; Cooper v. Hubback, 30 Beav. 160.

[2] Emden on Building, 409, citing Newson v. Pender, L. R. 27 Ch. D. 43, 52 L. T. 9.

[3] Ibid.

[4] Brooks v. Reynolds, 106 Mass. 31.

[5] Atkins v. Bordman, 20 Pick. 291. Under a covenant not to build, directed to securing an unobstructed view of the ocean, the elevation of an existing building is unlawful. Buck v. Adams, 45 N. J. Eq. 552, 17 Atl. R. 961. The defendant agreed to remove a building obstructing the plaintiff's prospect, and covenanted never to "put or place any buildings, timber, trees, or other nuisances on said land." It was held that "other nuisances" did not cover a lowering of the surface of the land. Cross v. Frost (Vt.), 23 Atl. R. 916.

[6] Lattimer v. Livermore, 72 N. Y. 174.

right closes up his windows indefinitely, or otherwise abandons the easement,[1] and generally, in equity, an easement may be lost by either acquiescence or agreement.[2]

If the owner of the dominant estate licenses the owner of the servient estate to do some act which prevents further enjoyment of the easement, it will be extinguished.[3] Thus, if the dominant owner erects a permanent blank wall in the place of that from which his windows formerly had an outlook, the easement will be gone forever.[4] So in *Winter* v. *Brockwell*,[5] where a license given by the owner of the dominant estate authorized the owner of the servient estate to build a skylight, the effect of which was to extinguish the easement. In these cases the licenses given were held to be irrevocable. In *Winter* v. *Brockwell*, Lord Ellenborough declared that, as the license given had been acted upon, it could not be rescinded, and certainly not without putting the defendant in the same position as before, by paying all expenses which had been thereby incurred by him.[6]

As we have previously said, the right of an easement of light may be lost or diminished by non-use. It is difficult, however, to define the effect of temporary abandonment by closing apertures and other acts. In the leading case of *Stokoe* v. *Singers*,[7] the judge

[1] Moore *v.* Ranson, 3 Barn. & Cr. 332; Pickard *v.* Bailey, 26 N. H. 165.

[2] Waterlow *v.* Bacon, L. R. 2 Eq. 514, 35 L. J. Ch. 643; Salaman *v.* Glover, L. R. 20 Eq. 444; Bannon *v.* Angier, 2 Allen, 128.

[3] Moore *v.* Ranson, 3 Barn. & Cr. 332; Lavillebeuve *v.* Cosgrove, 13 La. Ann. 323.

[4] Dyer *v.* Sanford, 9 Met. 393; Moore *v.* Ranson, *supra*.

[5] Winter *v.* Brockwell, 8 East, 308. See, also, Morse *v.* Copeland, 2 Gray, 302.

[6] Winter *v.* Brockwell, *supra*. See, also, Liggins *v.* Inge, 7 Bing. 682; Mold *v.* Wheatcroft, 27 Beav. 510.

[7] 8 Ellis & B. 31.

instructed the jury that right to light and air might be lost by abandonment, and that closing windows, with the intention of never opening them again, would be an abandonment destroying the right, but that closing them for a temporary purpose would not be so. Though the person entitled to the right might not really have abandoned his right, yet, if he manifested such an appearance of having abandoned it as to induce the owner of the adjoining land to alter his position, in the reasonable belief that the right was abandoned, there would be a preclusion as against him forever."[1] Several English cases may be found accepting the doctrine that the right continues wholly intact so long as any part of the ancient area continues to supply light, although some of the apertures may be permanently closed.[2] It seems, however, that where the right of light has been acquired simply by occupancy, it is lost when the person who gained it discontinues the occupancy.[3]

In *Newson* v. *Pender*,[4] the owner of a building, having right to certain easements of light, tore it down and rebuilt. The windows in the new building were larger in size, but some of them occupied the same places as the old. The defendant denied the continuance of the easement, and commenced to erect a building opposite, which would darken the plaintiff's lights. The court held that the right of the dominant owner was not lost by rebuilding. From this and

[1] Stokoe *v.* Singers, 8 Ellis & B. 31; Perkins *v.* Dunham, 3 Strobh. 224, per Erle, J.; Moore *v.* Ranson, 3 Barn. & Cr. 332.

[2] Bullen *v.* Dickinson, 1 W. N. 1885, p. 23, 33 W. R. 540; Newson *v.* Pender, 33 W. R. 243, L. R. 27 Ch. D. 43.

[3] Washb. on Easements, 545, citing Moore *v.* Ranson, 3 Barn. & Cr. 332, 341.

[4] L. R. 27 Ch. D. 43, 33 W. R. 243, 52 L. T. 9.

other English cases may be gathered the doctrine that a dominant owner does not lose his easement by simply altering the size, or by opening new windows, provided that some portion of it corresponds with the position of the ancient light.[1] A different rule may be stated where the easement has been acquired by express grant, for in such a case the intention of the grantor is generally clear that the grantee should have only the right to a window of a certain size and in a certain location.[2]

Non-use of an easement for twenty years will extinguish it.[3] So, where an ancient window had been bricked up for twenty years, and an adjacent owner had constructed a privy upon his premises, which was not a nuisance so long as the window remained closed, was held not liable for such, although when the former owner again opened his window the privy proved a nuisance.[4]

Alterations in windows may be permitted so long as they do not change the position of the parties, but if, in any substantial manner, the enjoyment of light by the dominant owner thereby becomes more disadvantageous to the servient estate, the owner thereof may avoid the same.[5] So, where a bay window was erected in the place of a plain flat window, the easement was defeated;[6] not, however, by merely enlarging the old

[1] Newson *v.* Pender, L. R. 27 Ch. D. 43, 33 W. R. 243, 52 L. T. 9; Tapling *v.* Jones, 11 H. L. C. 290, 20 C. B. (N. S.) 166, 34 L. J. C. P. 342.

[2] Blanchard *v.* Bridges, 4 Ad. & E. 176, 5 L. J. K. B. 78, 5 N. & M. 567; Hutchinson *v.* Copestake, 9 C. B. N. S. 863; Cherington *v.* Abneymill, 2 Vern. 646.

[3] Reg. *v.* Chorley, 12 Q. B. 515; Pope *v.* Devereux, 5 Gray, 409.

[4] Washb. on Easements, 547, citing Lawrence *v.* Obee, 3 Campb. 514.

[5] Garritt *v.* Sharp, 3 Ad. & E. 325.

[6] Tapling *v.* Jones, 11 H. L. C. 290, 20 C. B. (N. S.) 166, and cases cited *supra*, note 2.

window;[1] but if the owner of the servient estate desires, he can obstruct the light through the enlarged window, if he can do so without decreasing the dominant owner's original right.[2]

§ 177. SWINGING SHUTTERS. "Where a common owner of two tenements (the windows of one of which overlook the yard of the other, and receive light and air therefrom, its shutters swing out over such yard, and access from its fire-escapes, which overhang the yard, is had to such yard) severs the same by conveyance to different persons, an easement is created in favor of the dominant tenant which was first conveyed; the grantee of the servient tenement having notice thereof from the construction of the several tenements with respect to each other."[3]

§ 178. PRIVACY. It seems no action can be maintained for overlooking one's privacy, and the only remedy the party has is to build on his own property, shutting out the annoyance.[4] For a property-owner has no right to close up the windows of his neighbor's dwelling-house, though they open upon the yard of the former.[5] Even if a party cuts a new window through a blank wall, thereby disturbing the privacy of his neighbor, he is not liable to an action therefor.[6] Neither a court of law nor of equity will interfere with a man's right to open new windows, notwithstanding an invasion of the privacy of his neighbor.[7]

[1] Chandler *v.* Thompson, 3 Campb. 80.

[2] Renshaw *v.* Bean, 18 Q. B. 112–130; Thomas *v.* Thomas, 2 Crompt., M. & R. 34–40.

[3] Havens *v.* Klein, 51 How. Pr. 82; Chandler *v.* Thompson, 3 Campb. 80.

[4] Parker *v.* Foote, 19 Wend. 309.

[5] Havens *v.* Klein, 51 How. Pr. 82; Doyle *v.* Lord, 64 N. Y. 432.

[6] Turner *v.* Spooner, 1 Drew. & Sm. 467, 30 L. J. Ch. 801; Tapling *v.* Jones, 11 H. L. Cas. 290; Repenny *v.* S. E. Ry. Co., 7 El. & Bl. 660.

[7] Ibid., and Manner *v.* Johnson, L. R. 1 Ch. D. 680, 45 L. J. Ch. 404.

§ 179. PROSPECT. We have already said that the right of prospect cannot be acquired by prescription,[1] but may be by express grant.[2] Therefore no action can be maintained for simply obstructing a property-owner's outlook.[3]

§ 180. MAINTAINING OPEN SPACES; RESTRICTIONS AGAINST BUILDING. Easements are often provided for by which a particular space is to be kept open, or is to be built upon in only a restricted manner. The object is sometimes to preserve a prospect, but more frequently to improve the value of adjacent property by maintaining open park or garden spaces, and fitting the neighborhood for comfortable and agreeable residence. Whether they are termed by the parties covenants or easements, they are for many practical purposes to be regarded as easements. For instance, in *Ladd* v. *Boston*,[4] the city was held liable to pay for an easement destroyed, where the property taken by it and built upon was subject to mutual covenants by the owners of sixty-four adjoining lots to keep the space in question, among others, open and unincumbered as appurtenant to the several lots.

The general rules of covenants and easements, as regards the solemnities of the act of creation, will apply to these provisions. Thus, representations not in writing, by the vendor of a lot, that an adjoining lot shall be kept free from buildings, are not sufficient to create an easement.[5] Easements of this sort vary

[1] Parker *v.* Foote, 19 Wend. 309; Swinston *v.* Finn, 52 L. J. Ch. 235, 48 L. T. 636; Aldred's Case, 9 Coke, 58.

[2] Piggott *v.* Stratton, Johns. (Eng.) Ch. 341–357; Atty. Gen. *v.* Doughty, 2 Ves. Sen. 453.

[3] Knowles *v.* Richardson, 1 Mod. 55; Wells *v.* Ody, 7 C. & P. 410.

[4] 151 Mass. 585, 24 N. E. R. 858.

[5] Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. R. 503; Tibbetts *v.* Tibbetts (N. H.), 20 Atl. R. 979.

greatly according to the terms of the deed creating them, and their effect depends upon the provisions adopted in each case.[1]

The person claiming the enforcement of the restriction must of course have an interest sufficient to make him a party. Where a covenant was made by the grantor of land overlooking the sea, restricting himself from building upon the beach, the object being to preserve the grantee's prospect, it was held that the easement so created was appurtenant to the land, and ceased when the grantee assigned the land, reserving to himself the right to enforce the covenants.[2] Where land was leased in perpetuity to a railroad company, subject to a way and a restriction against building, and the company subsequently leased in perpetuity the dominant tenement, it was held that the easements were extinguished and could not be enforced by an assignee of the second lease.[3]

[1] Under a restriction forbidding houses, buildings, or any "other erection whatever" "upon" certain land, it was held that an area way constructed below the surface, for the purpose of supplying light and access to the adjoining building by means of gratings flush with the sidewalk, was not forbidden by the restriction. Rose *v.* Hawley, 118 N. Y. 502, 23 N. E. R. 904. In Rochester Electric Light Co. *v.* Rochester Power Co., 15 N. Y. Suppl. 33, it was held that a grant of a strip of land by the plaintiff to the defendant, in connection with a grant by the defendant to the plaintiff of an easement in adjacent lots for the passage of shafting, had given the defendant the right to place shafting of his own over the granted strip. The erection of a store and dwelling on land containing water-power, and bought under a restriction of the use to "milling and manufacturing purposes only," was held to be not a breach of the restriction, such building being necessarily incidental to manufacturing. Appeal of Madore, 129 Pa. 15, 17 Atl. R. 804. For other cases construing the legality of various structures under various restrictions, see Atty. Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. R. 2 (bay windows); Atty. Gen. *v.* Ayer, 148 Mass. 584, 20 N. E. R. 451 (porch); Buck *v.* Adams, 45 N. J. Eq. 552, 17 Atl. R. 961 (pavilion with open sides).

[2] Cadwalader *v.* Bailey (R. I.), 23 Atl. R. 20.

[3] Friedlander *v.* Canal Co., 13 N. Y. Suppl. 323.

In *Johnson* v. *Camp-meeting Association*[1] the purchaser was not allowed to enforce a park reservation shown on a map, the park not abutting on or having immediate connection with his lot, and not being referred to as being appurtenant. In *Graves* v. *Deterling*[2] the plaintiff failed to enforce a similar park reservation because he claimed only as heir of an original grantor who had parted with all beneficial interest in the dominant property, and had only a possibility of reversion remaining. Where the defendant bought two lots, on opposite sides of the street, stipulating that one should be kept forever open, and placing on the other a schoolhouse, the plaintiff as grantee of the latter was held to have no easement to have the former kept open, the grantor having released the covenant.[3] In *Chippewa Lumber Co.* v. *Tremper*[4] the defendant, threatened with ejectment for selling liquor on a lot owned by him, but forming one of several subject to a general scheme of restrictions against liquor-selling, was allowed to show that the general manager of the plaintiff corporation (the original grantor) sold liquor in the same village, though the express object of the restriction was to prevent drunkenness in the village, the fact in question tending to show (1) an unlawful purpose to establish a monopoly, and (2) a waiver of the condition.[5]

[1] 47 Hun, 374.

[2] 120 N. Y. 447, 24 N. E. R. 655.

[3] Lowell Institution for Savings *v.* Lowell, 153 Mass. 530, 27 N. E. R. 518. See Tibbetts *v.* Tibbetts (N. H.), 20 Atl. R. 979; Clark *v.* Devoe, 124 N. Y. 120, 26 N. E. R. 275.

[4] 75 Mich. 36, 42 N. W. R. 532.

[5] For other cases bearing on the right of a purchaser, under a general improvement scheme containing restrictions for the benefit of all purchasers, to enforce the restrictions against other purchasers taking with knowledge of the scheme, see De Gray *v.* Monmouth Beach Club-house Co.

§ 181. Remedies for Injuries to the Right. The easement of light and air once gained will usually be protected, as other incorporeal rights of which previous mention has been made.[1] That is to say, the owner of the dominant estate has a remedy at law by an action for damages, or he can ask for an injunction in equity, which is the usual practice. He has, besides, the right in certain cases to remove or abate the obstruction, but such a redress is unadvisable, for he may thereby lay himself liable to an action for damages.[2] To support an action at law, there must be a substantial violation of the plaintiff's right and actual damages;[3] yet the court may allow damages to be implied from slight interference with light in certain cases.[4] Light permitted to come from an angle of 45° to the window is not, according to an English rule, a violation of an ancient light.[5] The action may be brought by a

(N. J. Eq.), 24 Atl. R. 388; Coughlin *v.* Barker, 46 Mo. App. 54; Mulligan *v.* Jordan (N. J. Eq.), 24 Atl. R. 543; Knapp *v.* Hall, 63 Hun, 624, 17 N. Y. Suppl. 437; Delogny's Heirs *v.* Mercer, 43 La. Ann. 205, 8 So. R. 903; Coudert *v.* Sayre, 19 Atl. R. 190, 46 N. J. Eq. 386; Mackenzie *v.* Childers, 43 Ch. Div. 265; Halle *v.* Newbold, 69 Md. 265, 14 Atl. R. 662; Sennig *v.* Ocean City Ass'n, 41 N. J. Eq. 606, 7 Atl. R. 491. For cases determining the effect upon such restrictions of a change in the character of the use to which the surrounding quarter is put, see Jackson *v.* Stevenson (Mass.), 31 N. E. R. 691; Page *v.* Murray, 46 N. J. Eq. 325, 19 Atl. R. 11. For damages in case of covenants as to building in a certain way, under a general scheme, see Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. R. 741. For articles on the subject of building restrictions in general schemes of land improvement, see Sherrerd Depue, "Equitable Easements," 29 Am. L. Reg. N. S. 73; C. I. Giddings, "Restrictions upon the Use of Land," 5 Harvard L. Rev. 274.

[1] See *ante*, § 166.

[2] 2 Story Eq. Jur. § 925; Hyde *v.* Graham, 1 H. & C. 598; Rex *v.* Rorwell, 2 Salk. 459.

[3] Dent *v.* Auction Mart Co., L. R. 2 Eq. 238, 35 L. J. Ch. 555.

[4] Hertz *v.* Union Bank, 2 Gif. 686, 1 Jur. N. S. 127.

[5] Parker *v.* First Avenue Hotel Co., L. R. 24 Ch. D. 282, 49 L. T. 318.

lessee,[1] by a tenant for years,[2] — in fact, by any one whose legal interest in the property has been injured by the deprivation of the light.

Courts will in proper cases interpose to prevent a wrongful obstruction of light and air; for instance, where some contract exists that the light shall not be interfered with by building upon the adjoining premises, and a proposed obstruction is about to be erected in violation of such agreement.[3] The court will not grant the injunction where the injury will probably be trifling,[4] or where the right is doubtful,[5] or in any case where an action on the case may be sustained.[6] In a few instances mandatory injunctions have been granted after a building has been partly erected, directing the defendant to take down the offensive structure. But instances of such orders are extremely rare, as the injury to the plaintiff's property can be compensated for by an award of damages.[7] Sometimes the court will allow the defendant to complete the building, with an undertaking to tear it down if required to do so.[8]

The case of *Aynsley* v. *Glover*[9] indorses the well-settled rule that, whenever an action at law could be had and substantial damages obtained for the obstruction, an injunction will be granted, subject to discretion of court when special circumstances of the case arise.

[1] Gale *v.* Abbott, 10 W. R. 748, 8 Jur. N. S. 987.

[2] Jacomb *v.* Knight, 3 De G., J. & S. 533, 11 W. R. 812.

[3] Atty. Gen. *v.* Nichol, 16 Ves. 338.

[4] Ibid.

[5] Biddle *v.* Ash, 2 Ashm. 211; Robeson *v.* Pettenger, 1 Green. Ch. 57.

[6] Atty. Gen. *v.* Nichol, 16 Ves. 338.

[7] Newson *v.* Pender, L. R. 27 Ch. D. 43, 33 W. R. 243, 52 L. T. 9; Darrell *v.* Pritchard, L. R. 1 Ch. 244, 35 L. J. Ch. 223; Isenberg *v.* East India Co., 33 L. J. Ch. 392; Aynsley *v.* Glover, L. R. 18 Eq. 550, 44 L. J. Ch. 520.

[8] Newson *v.* Pender, *supra.*

[9] Aynsley *v.* Glover, 23 W. R. 459, L. R. 18 Eq. 553, 44 L. J. Ch. 345.

While few cases can be cited where an equity court has ordered an unfinished building to be torn down, it seems that it has no jurisdiction to decree that a completed building shall be demolished or removed.[1] This, however, is disputed by Lord Selborne in a leading English case.[2]

The court will usually compare the injury inflicted upon the defendant by pulling down his building with that of the plaintiff,[3] the value of the buildings upon both lots, and all the circumstances of the case, in estimating damages.[4]

[1] Curriers' Co. *v.* Corbett, 11 Jur. N. S. 719, 4 De G., J. & S. 764. But see cases cited p. 285, note 7.

[2] City of London Brewing Co. *v.* Tennant, L. R. 9 Ch. 219, 43 L. J. Ch. 457.

[3] Aynsley *v.* Glover, and Curriers' Co. *v.* Corbett, *supra*.

[4] Sayers *v.* Collyer, L. R. 28 Ch. D. 103, 54 L. J. Ch. 1, 48 L. T. 939, 33 W. R. 91.

CHAPTER XXII.

PARTY-WALLS AND EXCAVATIONS.

§ 182. MEANING OF "PARTY-WALL." Ordinarily a party-wall means a wall built partly on the land of one and partly on the land of another, for the benefit of both, in supporting timbers used in the construction of contiguous buildings.[1] Yet it should be borne in mind that a party-wall can only exist by virtue of a contract, by statute, or by prescription; the common law creates no such right. Consequently, although a wall may have been erected between two adjoining buildings, and used in common for the mutual support thereof, yet it would not be legally a party-wall, for each tenant might still own his half in severalty. If, however, this joint use continues for a period of twenty years, it becomes a party-wall, and each of the adjoining owners has a right to enjoy it, while neither has the right to remove it.[2] So a *division wall* may become a party-wall by agreement, either actual or presumed; and, although such wall may have been built exclusively upon the land of one, if it has been used and enjoyed in common by the owners of both houses for a period of twenty years, the law will presume, in the absence of evidence showing that such use and enjoyment was permissive, that the wall is a party-wall.[3]

[1] Brown and Otto *v.* Werner, 40 Md. 15.

[2] See Washb. on Easements, 454.

[3] Brown and Otto *v.* Werner, 40 Md. 15. In this case the wall was a common nine-inch division wall between the two houses, and it appeared that one of said houses was built into and rested upon the said wall, and

So, in a New York case,[1] where a grantor conveyed land to the centre of a wall, and at the end of ten years the grantee built against it, and thus used it for ten years more, it was held to be a party-wall.

If the owner of two adjoining lots erects houses thereon, with a wall between them for mutual support, and conveys them on the same day to different purchasers, even if one of the deeds excludes the wall, the purchaser of the other house is nevertheless charged with the servitude of having the wall stand as a support to the other house, for it is a party-wall as "long as the buildings shall endure."[2] So, where the owner of several lots conveys the dwellings by metes and bounds, by a line running through the centre of the "division wall," an easement is created, and the right of support of each house by the entire wall secured.[3] In such cases neither of the grantees can interfere with such party-wall to the injury of the other buildings without being liable to damages, though he do so for the purpose of making improve-

that this use and enjoyment had continued for more than twenty years. A brick wall erected partly on each of two adjoining lots, and used for many years as a common wall by the two owners, is a party-wall. Kelly *v.* Taylor, 43 La. Ann. 1157, 10 So. R. 255. A wall between adjoining houses used for more than twenty-one years is a party-wall, whether standing equally on each lot or not. McVey *v.* Durkin, 136 Pa. 418, 20 Atl. R. 541.

[1] Brooks *v.* Curtis, 4 Lans. 283. Where a builder erects a wall partly on the adjoining lot, which he subsequently becomes the owner of by purchase, he may, after such purchase, continue to treat the same as a party-wall in subsequent conveyance of the two properties. Beaver *v.* Nutter, 10 Phila. 345. But see Finley *v.* Stuburn, 38 Leg. Int. 386.

[2] Rogers *v.* Sinsheimer, 50 N. Y. 646.

[3] 2 Washb. Real Property, 78; 3 Kent Com. 437; Matts *v.* Hawkins, 5 Taunt. 20; Webster *v.* Stevens, 5 Duer, 553; Partridge *v.* Gilbert, 15 N. Y. 601. Where the common grantor of two houses supported by a single partition wall had conveyed each house and lot by a description which placed the dividing line at the centre of the partition wall, but without mentioning the wall, it was held to be a party-wall. Carlton *v.* Blake, 152 Mass. 176, 25 N. E. R. 83.

ments upon his own lot, and exercise the utmost care and diligence in performing the work;[1] and for such an injury the owner may recover damages, though the building be leased to a tenant who has covenanted to repair.[2]

§ 183. BUILDING A PARTY-WALL. The owners of adjoining building lots, in the cities and towns of this country, are not generally legally bound to join in building party-walls on the partition line, unless special ordinances regulate the matter. The proprietor of land has the indisputable right to decide when he will build, how he will build, and if he will build at all. He is lord paramount over his own land and everything that pertains to it. If some one usurps his land, and erects or improves buildings upon it, he does not thereby lose his rights, but can eject the trespasser and retain the building. So, if one half of a partition wall is erected upon his lot, he does not thereby become obligated to share the expense thereof, and no lien can attach to his interest in the same.[3] The fact that a wall stood originally upon the site, and the old building was destroyed by fire, does not render him liable to share in rebuilding. In such a case neither party has a right to pull down the wall without the other's consent, and yet an agreement to rebuild jointly is not implied from the preëxistence of the party-wall.[4] The grant of the right of building on the grantor's wall is not determined by destruction of the property by fire, leaving the wall standing.[5]

[1] Eno *v.* Del Vecchio, 4 Duer, 53; Daly *v.* Grunby, 22 Pitts. L. J. 8.

[2] Ibid.

[3] Sherred *v.* Cisco, 4 Sandf. 486; Ingles *v.* Bringhurst, 1 Dall. 341; Campbell *v.* Meister, 4 Johns. Ch. 334.

[4] Ibid.

[5] Brondage *v.* Warner, 2 Hill (N. Y.), 145.

While it is the duty of the person erecting a party-wall to make it of sufficient strength to support another building similar to the one of which it forms a part, yet he is not bound to make it strong enough to support any kind of a building which may be erected by the adjoining proprietor.[1]

In Iowa it seems that, where one of two adjoining lot-owners wishes to build, he has a right to erect a wall of the usual thickness, one half on his own lot, and one half on the lot adjoining. The owner of the adjoining lot may use the wall so erected upon payment of one half of its value, and after such payment he becomes a joint owner with the other.[2] So, in Pennsylvania, it is held that every builder is entitled to erect a party-wall partly upon his neighbor's land,[3] but for no purpose other than that of mutual support.[4]

Where the same person becomes the owner of two houses having a common or party wall, and tears it down and rebuilds on the same foundation, he is not

[1] Cutter *v.* Williams, 3 Allen, 196; Gilbert *v.* Woodruff, 40 Iowa, 320. If one builds on the line of his lot so unskilfully, or with such defective materials, that, when the adjoining owner improves his property, the wall falls in consequence of its inherent defects, it is *damnum absque injuria*. Richards *v.* Scott, 7 Watts, 460; Dunlop *v.* Wallingford, 1 Pitts. 127.

[2] Lugenbuhler *v.* Gilliam *et al.*, 3 Iowa, 391. For cases under statutes allowing the use of land for party-walls, and imposing an obligation to pay for such walls when used, see Cornell *v.* Bickley (Iowa), 52 N. W. R. 192; Freeman *v.* Herwig (Iowa), 51 N. W. R. 169; Sheldon Bank *v.* Royce (Iowa), 50 N. W. R. 86; Pew *v.* Buchanan, 72 Iowa, 637, 34 N. W. R. 453. See Nash *v.* Kemp, 49 How. Pr. 522, S. C. 12 Hun, 492. But see Baptist Pub. Soc. *v.* Wistar, 33 Leg. Int. 212, S. C. 2 W. N. C. 333; Monroe *v.* Conroy, 1 Phila. 441.

[3] Monroe *v.* Conroy, 1 Phila. 441.

[4] Baptist Pub. Soc. *v.* Wistar, 33 Leg. Int. 212, S. C. 2 W. N. C. 333. It has been held in Pennsylvania that where the owner of two contiguous lots erects a brick messuage on one of them, with a division wall partly on each lot, and sells to different purchasers, it does not thereby become a party-wall. Oats *v.* Middleton, 2 Miles (Pa.) L. Rep. 247.

liable to the original builder of the wall, though it is a personal charge.[1]

One has no right to erect a party-wall on the interior line of his neighbor's lot, from which the latter can derive no benefit.[2] So where a street is widened, without prejudice to existing structures until rebuilt, a party cannot continue a party-wall on what has become a public highway.[3]

§ 184. Use of a Party-Wall. Either of the owners of a party-wall has the right to increase its height, provided such increase can be made without detriment to the strength of the wall, or to the property of the adjoining owner, but he makes such addition at his peril.[4] The exercise of this privilege has the peculiar result that a wall may be a party-wall to a certain height, and subject to the sole ownership of one of the adjacent proprietors above that height.[5] In such a case the court will hold that, so far as the wall between the buildings is concerned, it is a party-wall, while it may grant an injunction prohibiting the removal of the other portion.[6] "We have known in this court," said James, L. J., in *Weston* v. *Arnold*, "cases in which property in London is intermixed in such a way that one

[1] Pratt *v.* Meigs, 2 Pars. Eq. Cas. (Pa.) 302.

[2] Whitman *v.* Shoemaker, 2 Pears. (Pa.) 320; Roedearnel *v.* Hutchinson, Ibid. 324. If the foundations of a wall be laid partly on the lands of adjoining owners, it will be deemed a party-wall, though, from the level of the ground, it is on the builder's land. Gordon *v.* Milne, 10 Phila. 15, S. C. 81 Pa. St. 54.

[3] Wistar's App., 6 W. N. C. 140.

[4] Brooks *v.* Curtis, 50 N. Y. 639; Daly *v.* Grunby, 22 Pitts. L. J. 8; Musgrave *v.* Sherwood, 54 How. Pr. 338; Everett *v.* Edwards, 149 Mass. 588, 22 N. E. R. 52. See Graves *v.* Smith, 87 Ala. 450, 6 So. R. 308.

[5] Weston *v.* Arnold, L. R. 8 Ch. 1084, 43 L. J. Ch. 123; Knight *v.* Pursell, L. R. 11 Ch. D. 412; Watson *v.* Gray, L. R. 14 Ch. D. 192; Musgrave *v.* Sherwood, 54 How. Pr. 338.

[6] Knight *v.* Pursell, *supra*.

man's basement and cellar extend under another man's shop, and, again, the first floor of one house is over the shop of the next house. In such a case there would be a party-wall between the two buildings below, while above would be only a private partition between two rooms in the same house. There is nothing in fact or in law to make it impossible or improbable that a wall should be a party-wall up to a certain height, and above that height be separate property of one of the owners." But the owner of one half of a party-wall has no right to extend it to the line of the street, thereby occupying a portion of his neighbor's land not built upon.[1]

The restrictions upon the use of the wall, and in general the character of the structure as a party-wall, begin (where an agreement is the basis) as soon as the wall is constructed, unless a contrary intention appears. Thus, under an agreement providing that either owner may build a party-wall, one half on each lot, and the other may use it on paying half the cost, the builder of the wall may be enjoined from making doors or other openings in it, though it does not appear that the other has used or intends to use the wall.[2]

§ 185. One of the joint owners of a party-wall can do any act concerning it which he desires, so long as he does not injure the property of the other. That

[1] Nash *v.* Kemp, 49 How. Pr. 522, S. C. 12 Hun, 592. According to the French Code, either owner can raise a party-wall, provided he does not thereby injure its solidity or strength, but he cannot call upon the other party for indemnity for the expense of supporting the portion he has added. Pardessus, Traité des Servitudes, 265; 3 Toullier, Droit Civil Français, 135. Where parties build, falling back from the line of the street, and their respective houses so remain for a period of fifty years, one of them cannot extend the party-wall to the line of the street without assent of the other. Duncan *v.* Hanbest, 2 Brewst. 362.

[2] Harber *v.* Evans, 101 Mo. 661, 14 S. W. R. 750.

is to say, he may "underpin the foundation, sink it deeper, and increase its thickness within the limits of his own lot, or its length or height, if he can do so without injury to the building on the adjoining lot. . . . He cannot pare off the part of the wall that stands on his own land, so as to render the remainder insufficient or unsafe, or excavate under the part of the wall upon his own premises, to the permanent injury thereof."[1] So, again, a party-wall may be used by the owners for whose mutual benefit it was constructed, not only for the support of their beams, and for the construction thereon of fireplaces and flues, but also to form a complete and perfect junction, in an ordinarily good, mechanical manner, between it and the exterior walls of the house.[2] Yet neither of the joint owners can underpin the wall without permission, unless it can be done without injury to the adjoining property.[3] Where a party-wall is erected in place of one condemned by the building inspector, it has been held in Pennsylvania that the other party cannot use the same without paying his share of the costs.[4]

§ 186. Agreements and Covenants Concerning Party-Walls. A license to erect a portion of a party-wall,

[1] Washb. on Easements, 455, citing Eno *v.* Del Vecchio, 4 Duer, 53, and 6 Duer, 17; Webster *v.* Stevens, 5 Duer, 553. On the other hand, where the wall is not a party-wall, and a party inserts the beams of his house therein without permission, the wall does not thereby become a party-wall and the owner may pull it down; nor is a license to make a window in and to hang shutters upon such wall a ratification of the act of inserting the beams. Roberts *v.* White, 2 Rob. (N. Y.) 425. The right to insert joists in the wall of an adjoining house is a servitude, and the extent to which it damages the property is for the jury. Stern *v.* Saeger, 34 Leg. Int. (Pa.) 21.

[2] Nash *v.* Kemp, 49 How. Pr. 522, S. C. 12 Hun, 592.

[3] Bradbee *v.* Christ's Hospital, 4 Mann. & G. 714, 761; Webster *v.* Stevens, 5 Duer, 553 *et seq.*

[4] Bailey's App. 1 W. N. C. 350.

given by the owner of an adjoining lot, is irrevocable if it has been acted upon by building the whole or part of the wall.[1] The obligation to pay half the cost of building a party-wall has generally been held to be a personal one, not passing to the grantee of the covenantor;[2] yet if the grantee use or occupy a part of such wall, he is liable for the reasonable value thereof.[3] So, while liability to pay for a party-wall may be held to be personal, *the use thereof runs with the land.*[4] In the leading case of *Ketellas* v. *Penfold*,[5] where the owner of a city lot granted to the owner of the adjoining lot the use of a portion of his land for the purpose of building a party-wall, with a covenant in the deed, for himself, his heirs and assigns, whenever he or they should build upon his or their lot, to pay one half the value of the said wall, the court held this covenant to be the grant of an easement running with the land and charging the grantee of the reversion. This principle is adopted in Massachusetts.[6] In another case, however, where

[1] Wickersham *v.* Orr, 9 Iowa, 253.

[2] Brown *v.* McKee, 57 N. Y. 684; Curtis *v.* White, Clarke's Ch. 389; Blach *v.* Isham, 28 Ind. 37; but see Thompson *v.* Curtis, 28 Iowa, 229.

[3] Wickersham *v.* Orr, 9 Iowa, 253. The construction of an independent wall, touching a party-wall at several points, but of sufficient strength to stand independently, is not such a "use" of the party-wall as makes the builder liable under an agreement to pay half the cost of the party-wall upon making use of it. Kingsland *v.* Tucker, 115 N. Y. 574, 22 N. E. R. 268. Under an agreement to pay for one half of a party-wall when the promisor uses it, he becomes liable to pay as soon as he has sold his lot to another, the receipt of a consideration for the right to use the wall being a sufficient "use" to determine his obligation. Nalle *v.* Paggi, 81 Tex. 201, 16 S. W. R. 932.

[4] Thompson *v.* Curtis, 28 Iowa, 229. In Appeal of Heimbach (Pa.), 7 Atl. R. 737, it was held that the right to use a partition wall wholly on the land of the adjoining owner did not run with the land against the latter's vendee without notice.

[5] 4 E. D. Smith, 122.

[6] King *v.* Wight (Mass.), 29 N. E. R. 644.

the wall had been erected by two tenants for years, it was held not to create an easement, as neither could grant a permanent interest in the land or bind the reversioner.[1]

As the obligation to pay half the cost of building a party-wall is a personal one, it is generally held to be not enforcible against the land in the hands of a purchaser;[2] and, according to New York decisions, not even an express covenant to reimburse the first builder for the use of a party-wall runs with the land and binds the grantee of the covenantor.[3] It has, therefore, been held that a party-wall is not a legal incumbrance,[4] and a purchaser without notice may use the wall standing on his own land, although he cannot be compelled to pay the first builder the value thereof.[5] Indeed, the right to reimbursement for the use of a party-wall does not pass by a conveyance of the premises,[6] or by a mortgage thereof.[7]

[1] Webster *v.* Stevens, 5 Duer, 553.

[2] Curtis *v.* White, Clarke Ch. 389; Scott *v.* McMillan, 19 Alb. L. J. 279; Brown *v.* McKee, 57 N. Y. 684; Nalle *v.* Paggi (Tex.), 9 S. W. R. 205. But in Massachusetts the liability to pay upon user, having been created in connection with the grant of an easement, runs with the land. Savage *v.* Mason, 3 Cush. 500; King *v.* Wight (Mass.), 29 N. E. R. 644.

[3] Cole *v.* Hughes, 54 N. Y. 444; Brown *v.* McKee, 57 N. Y. 684.

[4] Hendricks *v.* Stark, 37 N. Y. 106; Waterman *v.* Van Every, 3 Alb. L. J. 30.

[5] Sherred *v.* Cisco, 4 Sandf. 480. So, where a husband builds on his wife's land, and, in pursuance of an agreement with the adjoining owner, erects a party-wall one half on such property, for which the latter agrees to reimburse him when the wall is used, this was held to be a mere chose in action and not to pass to the wife's grantee. McDonnell *v.* Culver, 8 Hun, 155; Stewart *v.* Aldrich, 8 Hun, 24.

[6] Cole *v.* Hughes, 54 N. Y. 444; Brown *v.* Pentz, 1 Abb. Dec. 227; Doyle *v.* Ritter, 6 Phila. 577; 8 Phila. 264; Behrens *v.* Hoxie, 26 Ill. App.

[7] Thompson *v.* Somerville, 16 Barb. 469. See McGittigan *v.* Evans, 8 Phila. 264; Jordan *v.* Kraft, 33 Neb. 844, 51 N. W. R. 286; Stehr *v.* Raben, 33 Neb. 437, 50 N. W. R. 327; Conduitt *v.* Ross, 102 Ind. 66, 26 N. E. R. 198.

In *Burlock* v. *Peck*[1] there was an agreement that the adjoining owner was to have "the privilege of building a party-wall twelve inches thick, extending six inches on each side of the line," for which the grantor agreed to pay one half the cost when the wall should be used. After the grantee died, his administrator sued the grantor for the cost of the wall. It was held that the covenant ran with the land, and the administrator recovered.[2] The weight of authority, however, seems to be that a reservation of the right to use a party-wall, to be erected by the grantee, only gives a right of support for an adjoining building, and confers no interest in the land itself.[3] But an agreement under seal can convey half the use of a party-wall, thereby creating the easement;[4] in fact, an unsealed written agreement may be sufficient to create an easement to use a wall as a party-wall.[5] So, in Ohio, where a wall is in existence at the time an agreement that an adjoining proprietor can use it is made, the use of the word "assigns" is not necessary to make the easement run with the land, "nor does the want of privity of estate between the parties prevent a conveyance from running with the land."[6]

Where a wall is built over an adjoining lot by consent of the parties, and that lot is left vacant for the

417; Gibson *v.* Holden, 115 Ill. 199, 3 N. E. R. 282. So, also, in Pennsylvania: Hart *v.* Kircher, 5 S. & R. 1; Davids *v.* Harris, 9 Pa. St. 501; Gilbert *v.* Drew, 10 Pa. St. 219. But since the Act of April 10, 1849 (P. L. 600), the right of the first builder is an interest in the realty, and passes to the grantee of the land. Knight *v.* Beenken, 30 Pa. 372.

[1] 2 Duer, 90.

[2] Murley *v.* McDermott, 8 Ad. & E. 138.

[3] Ogden *v.* Jones, 2 Bos. 685.

[4] Platt *v.* Eggleston, 20 Ohio St. 414, 2 Duer, 91.

[5] Pendleton *v.* Fosdick, Ohio Superior Court, 1879; 8 Rec. 148, 486; Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. R. 753.

[6] Ibid.

benefit of both parties, the owner, when he builds, must pay for the wall built over the alley, as much as for any other party-wall.[1]

If either owner of a party-wall raises it above its original height, he will be obliged to keep the addition in repair; but if the adjoining owner uses the addition for the support of the building upon his side, he will properly be chargeable with the cost thereof, as the whole wall thereby becomes a party-wall.[2]

Where two adjoining proprietors verbally agreed to build a party-wall, which had been partly completed, it was held that the one who had prepared his materials and planned his building, relying upon the performance of the contract, upon the refusal of the other party to proceed, might, after notice, go on and finish the wall and recover one half the expense thereof.[3]

§ 187. Ownership of Party-Walls. The better view is, that a party-wall should be considered as divided into two halves longitudinally and vertically, each half being owned by the owner of the soil beneath, and being subject to the adjacent owner's easement of support.[4] But it is usually said that, where a wall is enjoyed by adjacent owners, the presumption arises that

[1] Haines *v.* Drips, 2 Pars. Eq. Cas. (Pa.) 236. In this case the purchaser of a lot at a sheriff's sale was required to pay a moiety of the cost of a party-wall which he used. The party by whose order a house is erected is the builder, and liable for the value of the party-wall, though the house was erected under a contract for a gross sum, "including party-walls," which had been paid. Davids *v.* Hart, 9 Pa. St. 501.

[2] Washb. on Easements, 471; Wiltshire *v.* Sidford, 1 M. & R. 404. Under an agreement giving the parties the reciprocal right to enlarge a party-wall, payment by the party seeking to enlarge of his share of the cost of the original wall is not a condition precedent to the exercise of his rights. Matthews *v.* Dixey, 149 Mass. 595, 22 N. E. R. 61.

[3] Rindge *v.* Baker, 57 N. Y. 209.

[4] See Watson *v.* Gray, 14 Ch. Div. 192; Andrae *v.* Haseltine, 58 Wis. 395, 17 N. W. R. 18; Gibson *v.* Holden, 115 Ill. 199, 3 N. E. R. 282.

they hold the wall as tenants in common.[1] So, "where the quantity of land contributed by each is not known, the reasonable presumption from the common use of the wall is *primâ facie* that the wall, and the land on which it is built, are the undivided property of both."[2] Yet, although the law presumes a common ownership, and the easement of a party-wall, it is nevertheless competent for one of the parties to show that the wall stands entirely upon his own land;[3] and that, where the exact extent of the land originally belonging to each can be ascertained, they are not tenants in common of the wall.[4] So, where two adjoining proprietors put up a partition fence between them, agreeing that each should own that portion of the fence put up by himself, and the fence built by one was mistakenly located upon the land of the other, who sold the land to one having no notice of the agreement as to the ownership of the fence, the fence was held to pass to the purchaser of the realty, notwithstanding the presumption of common ownership.[5] In such cases, the right of property in a party-wall, though built by the owners thereof jointly, follows the ownership of the land upon

[1] 3 Kent Com. 438; Hutchinson *v.* Mains, Alc. & Nap. 155; Duke etc. *v.* Clarke, 8 Taunt. 627; Weil *v.* Baker, 39 La. Ann. 1102, 3 So. R. 361.

[2] Wiltshire *v.* Sidford, 8 Barn. & Cr. 259, n.; Guy *v.* West, 2 Selwyn N. P. 1297; Cubitt *v.* Porter, 2 M. & R. 267.

[3] Murley *v.* McDermott, 8 Ad. & E. 138; Sherred *v.* Cisco, 4 Sandf. 480, 490.

[4] Matts *v.* Hawkins, 5 Taunt. 20; Taylor *v.* Stendall, 7 Q. B. 634.

[5] Climer *v.* Wallace, 28 Mo. 556. On the completion of a building, the party-wall is the property of the owner of the house and not of the contractor. Brierly *v.* Tudor, 2 Am. L. J. 191; Eichert *v.* Wallace, Ibid. 326. A wall was erected, through a mistake as to the boundary, just beyond the line and within the adjacent lot. The two owners, both sharing the mistake, agreed that the wall should be permanently maintained as a party-wall. It was held that, as the mistake related only to the boundary, the party-wall agreement was valid, and the second owner could not remove the wall. Houghton *v.* Mendenhall (Minn.), 52 N. W. R. 269.

which it stands; that is to say, there is no change of title, for, while the land is severally owned as before, the only difference is that each of the owners, for the use of his soil, and mutual benefit conferred and received, has an easement of support upon that portion standing upon the land of the other.[1] Where, however, a wall has been erected by a contract or agreement between the adjoining owners, their respective property rights may be regulated to a certain extent by the agreement itself; and in the absence of such an agreement, the law presumes that their rights are equal.[2] We have already seen that, where two houses belonging to the same owner are sold to different purchasers, each may take to the centre of the division wall, which thereby becomes a party-wall,[3] each owning one half, yet having a cross-easement over the other half.[4] But in Pennsylvania it has been held that, where the owner of two contiguous lots erects a brick messuage on one of them, with a division wall partly on each lot, on a subsequent sale to different purchasers it does not become a party-wall within the meaning of the statute.[5]

Where half of a wall rests on a vacant lot, the presumption is that it belongs to the owner of the contiguous lot whereon rests the main building, if such half wall has been used by the owner of it.[6]

§ 188. Repairing and Rebuilding Party-Walls. The owners of a party-wall which has become ruinous are

[1] Weston *v.* Arnold, L. R. 8 Ch. 1084; Murley *v.* McDermott, 3 N. & P. 356, 8 A. & E. 138.

[2] Pardessus, Traité des Servitudes, 248. See Taylor *v.* Stendall, 7 Q. B. 634.

[3] Partridge *v.* Gilbert 15 N. Y. 601.

[4] Knight *v.* Pursell, L. R. 11 Ch. D. 412.

[5] Oat *v.* Middleton, 2 Miles, 247; McGittigan *v.* Evans, 8 Phila. 264.

[6] Bertram *v.* Curtis, 31 Iowa, 46.

bound to contribute *pro rata* to its reërection, but not to build it higher or of more costly materials.[1] But, on the other hand, if one of the joint owners takes down a party-wall while it is still in sound condition and sufficient for the purpose for which it was erected, he is liable not only for the cost of rebuilding, but also for any damage he may thereby have occasioned the other owner.[2] When a party-wall, however, has become dilapidated, or wholly unfit for use, it seems that either owner may pull the whole wall down and rebuild it, upon giving reasonable notice to the other owner; and in such a case, if he uses proper care, he will not be responsible for damages thereby occasioned.[3] So, in an Ohio case, the pleadings disclosed that T and H were owners of adjoining property in the city of Cincinnati, between whose buildings a party-wall had stood for twenty-one years, and the defendant, the grantee of H, desiring to erect upon his lot a building adapted to its increased value, notified the plaintiff, the adjoining owner, of his intention to pull down his half of the partition wall, and, upon the plaintiff's refusing, the defendant took down the wall, using due care, but the plaintiff's wall fell; it was held that the facts stated did not constitute a good cause of action.[4] In *Richardson* v. *Frank*, it was held that, where a party-wall is decayed and needs rebuilding, it may be removed by either party for the purpose of rebuilding, whether the other party consents or not. And where

[1] Campbell *v.* Meister, 4 Johns. Ch. 334; but see Sherred *v.* Cisco, 4 Sandf. 486; Partridge *v.* Gilbert, 15 N. Y. 601.

[2] Potter *v.* White, 6 Bos. 644.

[3] Partridge *v.* Gilbert, *supra;* Heine *v.* Merrick, 41 La. Ann. 194, 5 So. R. 760.

[4] Hiett *v.* Morris, 10 Ohio St. 523, 19 Wend. 318, 11 Md. 7, 33 Pa. St. 369. See Heart *v.* Kruger, 121 N. Y. 386, 24 N. E. R. 841.

a preliminary injunction had been dissolved on its appearing that the wall needed rebuilding, the court retained the petition, so that, should any damage be caused by negligence during the work, it could be recovered.[1]

In *Reynolds* v. *Fargo*[2] it was held that, in the absence of any covenant to the contrary, neither party is bound to rebuild a party-wall which has been torn down as a measure of safety. This decision is hardly borne out by the authorities; the law, in fact, seems to be the other way. The question once arose before Chancellor Kent in a case where a plaintiff had pulled down a party-wall which had become unsuitable. He had given fair notice to the other owner, but the latter refused to consent, and requested him expressly not to remove the wall. The evidence showed the wall to be in a ruinous condition. The chancellor ordered the defendant, the owner of the adjacent estate, to contribute an equal share towards reconstructing the wall. The doctrine now seems fairly well settled that, if a party-wall requires repairing or rebuilding in the estimation of experts, one party can compel the other to contribute a ratable proportion of the cost thereof.[3] It is important to observe that the reasoning upon which the foregoing decisions are based is not appli-

[1] Richardson *v.* Frank, 2 Sup. C. R. 60, and Hiett *v.* Morris, *supra.* One who has consented to a joint wall cannot tear it away after a building has been erected thereon upon faith in his acquiescence in its location and construction. Miller *v.* Brown, 33 Ohio St. 547. The principle laid down in the French Digest, 5 Duranton Cours de Droit Français, 342, that neither party has a right to pull down a party-wall at pleasure, will generally be upheld in this country.

[2] 1 Sheld. 531.

[3] Campbell *v.* Meister, 4 Johns. Ch. 334; Peck *v.* Day, 1 N. Y. Leg. Obs. 312; 3 Kent Com. 438. In Brondage *v.* Warner, 2 Hill, 145, the plaintiff was allowed to use a party-wall after the rest of the adjoining building had been burned down.

cable to those cases in which party-walls have been destroyed by fire or other calamity; for, "there being no agreement to build a second wall, neither party is under obligation to join with the other in doing so."[1]

There is but slight, if any, distinction between a partial destruction of a wall through natural causes and a total obliteration thereof; and it seems that, "if the right of mutual support continues, by means of the original arrangement, or by prescription, it is for just such an easement as was originally conceded, or which has been established by long enjoyment. But in the changing conditions of our cities and villages it must often happen that edifices of different dimensions and an entirely different character would be required. And it might happen, too, that the views of one of the proprietors, as to the value and extent of the new buildings, would essentially differ from those of the other, and the division wall which would suit one of them would be inapplicable to the objects of the other."[2]

A Pennsylvania decision declares that if, by the settling of a party-wall, it leans over upon the adjoining lot, the person using it must nevertheless pay a moiety of its cost, deducting the damage sustained by the encroachment.[3]

The subject of party-walls is largely regulated by statutes which generally bear close resemblance to those doctrines laid down by the French Code.

English authorities substantially confirm the princi-

[1] Washb. on Easements, 460; Sherred *v.* Cisco, 4 Sandf. 480; Partridge *v.* Gilbert, 15 N. Y. 601.

[2] Denio, J., Partridge *v.* Gilbert, 14 N. Y. 601; Sherred *v.* Cisco, 4 Sandf. 480, citing Richards *v.* Rose, 9 Exch. 218; Pardessus, Traité des Servitudes, 251.

[3] Sauer *v.* Monroe, 20 Pa. St. 219. This case also lays down that "if an adjoining owner breaks into a party-wall without notice, he thereby waives his right to choose arbitrators or a decision of the regulators."

ples set forth in this chapter: Thus, it is well settled that one can pull down any wall standing upon his freehold, provided it is not owned in common with the proprietor of the adjoining premises,[1] or an easement for mutual support has not been granted.[2] The rule is otherwise if the wall is a party-wall; in such cases the one who pulls it down is liable to his co-owner for damages occasioned thereby.[3] Either owner may put upon it any amount of weight he desires, provided he does not thereby injure its stability.[4] Either may maintain an action for an injury done to his half of a party-wall; he may also pull it down for the purpose of rebuilding, though he may thereby render himself liable to an action for waste, if it appears that the wall did not need rebuilding, or that he proceeded with the work without reasonable notice to the other owner.[5] The law does not seem settled as to the rights and liabilities of the owners of a party-wall to keep it in repair, or to rebuild in case of fire or natural decay.[6]

In *Brown* v. *Windsor*[7] the doctrine is recognized that, although each of two adjoining owners may hold his half in severalty, and can gain an easement of support so long as the wall shall stand, neither can do anything to injure this mutual right.

When the wall is owned in severalty, each of the owners may bring an action for injuries done to his half;[8] but where the wall is a party-wall, neither

[1] Wiltshire *v.* Sidford, 1 M. & R. 404; Wigford *v.* Gill, Cro. Eliz. 269.
[2] Ibid.
[3] Gayford *v.* Nichols, 9 Exch. 708; Davis *v.* Blackwall Ry. Co., 1 M. & Gr. 709.
[4] Sheffield Industrial Society *v.* Jarvis, W. N. 1871, 208.
[5] Cubitt *v.* Porter, 2 M. & R. 267.
[6] Ibid.; Murley *v.* McDermott, 2 Ad. & E. 138.
[7] 1 Crompt. & J. 20.
[8] Matts *v.* Hawkins, 5 Taunt. 20.

owner can bring an action of trespass or trover against the other, unless there has been a total destruction or conversion of the common property.[1] An action of ejectment can be maintained if there has been an actual ouster of the plaintiff.[2]

§ 189. WINDOW LIGHTS IN PARTY-WALLS. In the city of Philadelphia a party-wall must be built without openings, and the putting of windows therein will be restrained by injunction.[3] Yet, after acquiescence in the enjoyment of a window in a party-wall for the period of prescription, the right to use it is not lost by the lapse of time;[4] but by a later decision in Pennsylvania it was held that a party cannot, by twenty-one years' adverse user, acquire the right to maintain a window in a party-wall.[5]

§ 190. RIGHT OF SUPPORT. An adjacent owner has no right to deprive his neighbor of the natural support afforded by his soil;[6] for this right exists independently of contract.[7] While he who makes excavations upon his own land must provide for the support he takes away from his neighbor, he is not responsible for *buildings* erected upon the adjacent land; in other words, his liability is limited to the extent only of a natural support for the soil, and not for the weight put upon it by his neighbor.[8] If a land-owner excavates his land

[1] Voyce *v.* Voyce, Gow, 201, Co. Lit. 200.

[2] Stedman *v.* Smith, 8 El. & Bl. 1.

[3] Volmer's App., 61 Pa. St. 118; Vansyckel *v.* Tryon, 6 Phila. 401. See Graves *v.* Smith, 87 Ala. 450, 6 So. R. 308. This does not apply to other places in Pennsylvania. Shell *v.* Kemmerer, 2 Pears. 293.

[4] Rondett *v.* Bedell, 1 Phila. 366.

[5] Milnes' Appeal, 81 Pa. St. 54.

[6] Shafer *v.* Wilson, 44 Md. 268.

[7] Thurston *v.* Hancock, 12 Mass. 220; Beard *v.* Murphy, 37 Vt. 98.

[8] Wyatt *v.* Harrison, 3 B. & Ald. 871; Quincy *v.* Jones, 76 Ill. 221; Richardson *v.* Vt. C. R. R., 25 Vt. 465; Busby *v.* Holthaus, 46 Mo. 161; McGuire *v.* Grant, 1 Dutch. 356; Bell *v.* Love, L. R. 10 Q. B. D. 547;

so close to that of another as to injure the latter's natural support, whereby the soil gives way, the owner making the excavations is responsible for all the injury thereby occasioned to the land, and also for the disturbance of a right of way over the same, without proof of carelessness, negligence, or want of skill in making the excavations, but not for injuries to the buildings of his neighbor, unless an easement of support therefor has been granted or gained.[1]

§ 191. Where buildings have been erected, the right to natural support is not lost, nor is it extended thereby, for the query is whether the land would have sunk if the weight of the buildings had not been upon it.[2]

The right of a land-owner to make excavations must, however, be exercised with due care and skill where the adjacent lot has been built upon, and he must observe all reasonable precautions to prevent injury to the adjoining tenement.[3] It is his duty to notify his neighbor of the contemplated improvements.[4] Thus, while a land-owner has an unquestionable right to dig

Hamer *v.* Knowles, 6 H. & N. 454; Birmingham *v.* Allen, L. R. 6 Ch. D. 284.

[1] Foley *v.* Wyeth, 2 Allen, 131. So in Gilmore *v.* Driscol, 122 Mass. 199, it was held that, where one digs a pit on land so that it caves an adjoining estate by the operation of natural or ordinary causes, he is liable for injuries to the land, but not to buildings.

[2] Smith *v.* Thackerah, L. R. 1 C. P. 564; Brown *v.* Robbins, 4 H. & N. 186. Yet the damages may be more where the injury has been to an adjacent estate upon which buildings stand. Chapman *v.* Day, 47 L. T. 705. In a Maryland case, where the house of the adjoining proprietor was shown to be so weak that it could not stand the reasonable improvements of the other proprietor, though conducted with skill and care, it was held that the latter had no right to hasten its fall by making excavations. Shafer *v.* Wilson, 44 Md. 268.

[3] Brown *v.* Werner, 40 Md. 15; Wyley Canal Co. *v.* Bradley, 7 East, 368.

[4] Schriever *v.* Stokes, 8 B. Mon. 453; Richards *v.* Scott, 7 Watts, 460; Shafer *v.* Wilson, 44 Md. 268.

to the line of his estate, and as between abuttors such digging is justified on the principle that a proprietor has entire domain over the whole of his land, this privilege is restricted, to a certain extent, by the cross-right which his neighbor may have to support *ex jure naturæ*.[1]

§ 192. SUPPORT FOR BUILDINGS. The right to support of buildings is acquired only by grant or prescription, and is not, like that of natural support for land, a *primâ facie* adjunct to the ownership of property.[2] When, however, the right has been acquired, it is governed by the same legal rules as that of natural support.[3] Where the owner of two adjoining building lots sells one of them, reserving the other for his own enjoyment, the easement of support is implied; but such a right only extends against the vendor as far as the *buildings* are concerned, while the natural right "runs with the land," and is binding upon the grantees of the owner of both the adjacent and subjacent (as mines) land.[4] The right of support from adjoining buildings may also be implied when the owner of both lots sells the same to different purchasers.[5] So, where a man

[1] Thurston *v.* Hancock, 12 Mass. 220; Greenleaf *v.* Francis, 18 Pick. 117; Howland *v.* Vincent, 10 Met. 371.

[2] Dalton *v.* Angus, L. R. 6 App. Cas. 740; Bonomi *v.* Backhouse, 1 El., Bl. & El. 625; Washb. on Easements, 547; Richards *v.* Scott, 7 Watts, 460; Dalton *v.* Angus, L. R. 6 App. Cas. 740. But a land-owner cannot acquire a prescriptive title to the lateral support of buildings unless there has been adverse possession. Handlan *v.* McManus, 42 Mo. App. 551.

[3] See opinion of Lord Shelborne, Dalton *v.* Angus, L. R. 6 App. Cas. 740.

[4] Goddard, 181.

[5] Murchie *v.* Black, 19 C. B. N. S. 190; Peyton *v.* Mayor, 9 B. & C. 736. "A grant with a covenant of warranty for quiet enjoyment, reserving the right to enter on certain part of the premises to dig and take the clay and sand fit for brickmaking, does not impose upon the grantor the obligation of leaving a lateral support for the land adjoining his excavations; it is a

leases or conveys part of his land for building purposes, an easement of support for the buildings to be erected may be implied as coextensive with the known uses of the premises.[1] The leading English case on this subject is that of *Dalton* v. *Angus*, and in this it is positively held that a right to lateral support may be acquired for buildings.[2] In an American case [3] an action of trespass on the case was brought by a joint owner of a party-wall to recover for damages sustained by the removal of the wall. The evidence showed that adjoining brick houses had been built about fifty years before, with an alley-way between them for mutual use, its walls terminating above in an arch, upon the centre of which, and upon beams of wood extending from the top of one alley to the other, was built the partition wall between the second, third, and garret stories of the two houses. The defendant, after giving the plaintiff due notice, proceeded to take down the walls of his house, together with the alley-wall next thereto, in consequence of which A's house fell. Although it was further shown in evidence that alterations had been made some years before in the plaintiff's house, and that he had placed props against it to prevent it from falling, it was held that the right of support as an easement had been gained, and the defendant had no right to disturb the wall. The courts do not, however, imply an easement of support unless a grant can be readily gathered from the adverse enjoyment, or other circumstances, and not from the

reservation, not an exception." Rychman *v.* Gillis, 57 N. Y. 68; Ludlow *v.* H. R. R. Co., 57 N. Y. 128.

[1] Robinson *v.* Grave, 29 L. T. 7.

[2] Dalton *v.* Angus, L. R. 6 App. Cas. 740.

[3] Downing *v.* Hennings, 20 Md. 179.

mere lapse of time;[1] and, as a rule, where the owner of a lot builds on his building line, and the building is thrown down by reason of excavations made upon the adjoining lot, in the absence of improper motives, or carelessness, no recovery can be had for injury done to the building.[2] So, where the owner of land built a house within two feet of his boundary line, and ten years afterwards the owner of the land adjoining excavated the earth on his own land to such an extent as to endanger the house, and the owner of the house for that reason took it down, it was decided that he could maintain an action for the falling of his natural soil into the excavation, but not for the damage done the building.[3]

An English case, *Solomon* v. *Vintners' Co.*,[4] recognizes a distinction between houses separated from others by intervening houses and those immediately adjoining. In this case a small row of buildings had been out of the perpendicular for years, and then fell, owing to the pulling down of one of them. The court held that the owner of the house not immediately adjoining could not recover.

§ 193. Right of Subjacent Support. Ordinarily the owner of land is entitled to subjacent support, not only for the land itself, but also for the buildings upon it;[5] but if he desires he can contract with other parties in such a way that he may still retain the ownership of the surface of the land while another person owns mines below the surface, and still another becomes the proprietor of stories above. It is well settled that the

[1] Downing *v.* Hennings, 20 Md. 179.
[2] McGuire *v.* Grant, 1 Dutch. 356.
[3] Thurston *v.* Hancock, 12 Mass. 220.
[4] 4 H. & N. 585.
[5] Smith *v.* Thackerah, L. R. 1 C. P. 564.

owner of the sub-surface is liable for injuries caused to the land or buildings above by his failure to provide sufficient support for the *land* in its natural state.[1] Yet it is doubtful to what extent mine-owners are required to furnish support for *buildings* upon the surface where a right has not been gained by prescription.[2]

It frequently occurs that buildings are erected in such a manner that each story is complete in itself, as a dwelling, and is let or sold to persons different from those holding the other floors or flats. In such cases it is but just that the owner of the upper story, independently of any express grant, should have a right to the support of the lower story.[3] And, as a general rule, the proprietor of the lower flat or foundation is bound to maintain the walls and other support for the owner above.[4] So it has been held that, "when a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground floor is bound by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, so that it may be able to bear such weight."[5] On the other hand, where the owner of the upper story brought an action in assumpsit for repairs he had made to the roof, which was in need thereof, against the owner of the lower floor for contribution, it was held that, as the owner of a dwelling above that of another can compel the latter to preserve the walls and timbers intact so

[1] Jones *v.* Wagner, 66 Pa. St. 429; Horner *v.* Watson, 79 Pa. St. 242; Bonomi *v.* Backhouse, El., Bl. & El. 622.

[2] Bonomi *v.* Backhouse, *supra*.

[3] Humphries *v.* Brogden, 12 Q. B. 739, 747; Smith *v.* Martin, 5 Ellis & B. 30, 47.

[4] Richards *v.* Rose, 9 Exch. 219; Humphries *v.* Brogden, 12 Q. B. 747.

[5] Graves *v.* Burdan, 26 N. Y. 501; Loring *v.* Bacon, 4 Mass. 575; Cheesborough *v.* Green, 10 Conn. 318.

as to support his dwelling, it is correspondingly the duty of the upper tenant to keep the lower tenant from injury coming from above.[1]

§ 194. REMEDIES FOR DAMAGES TO SUPPORT. As to injuries to other easements, courts of equity will allow an injunction to restrain attempted injuries[2] to support; or an action for damages may be brought.[3] A party cannot, however, maintain the latter until actual damage has resulted from the removal of the support of his building.[4] So, where an excavation for a cellar is made adjoining an existing building, the owner of the latter cannot claim damages until damage ensues;[5] yet Chief Justice Cockburn dissented from this view, and held that a second action might be maintained for prospective damages.

As to the measure of damages, the court's instructions in a leading Maryland case may be quoted:[6] "If they" (the jury) "should find the wall between the two houses to be a party-wall, and that the defendant A employed the defendant B to improve his (A's) building, and, with a view to such improvement, without giving notice to the plaintiff of such intention, the cellar of A's house was dug below the foundation, and that the same was done so carelessly and negligently

[1] Loring *v.* Bacon, 4 Mass. 575; Tenant *v.* Goldwin, 6 Mod. 311; Keilway, 98 b, pl. 4. As to rights of tenants of upper and lower floors to easement of common entrance-way, see Browning *v.* Dalesme, 3 Sandf. 13. But in a Connecticut case the court declared that the owner of the lower story of a house cannot maintain an action against the owner of the upper for neglecting to repair the roof, though he may have a remedy in equity. Cheesborough *v.* Green, 10 Conn. 318; but see Anonymous, 11 Mod. 7.

[2] N. E. Ry. Co. *v.* Elliott, 29 L. J. Ch. 808; Dalton *v.* Angus, L. R. 4 Q. B. D. 162.

[3] *Ante*, § 190.

[4] Bonomi *v.* Backhouse, El., Bl. & El. 620.

[5] Ibid.

[6] Upheld by Md. Court of Appeals, Brown & Otto *v.* Werner, 40 Md. 15.

that portions of the said wall fell in, and caused injury to the other portions of the plaintiff's house, and hazarded the falling in of the entire wall, so as to make the occupation of the plaintiff's house dangerous, and that he was for some days unable to carry on his business, then the plaintiff is entitled to recover such damages as would enable him to reinstate the wall, and the house itself, in as good condition as they were before the injury, and as would compensate him for loss consequent upon the interruption of his business."

CHAPTER XXIII.

WATER.

§ 195. Reservoir or Water Companies. In many cities and towns, water is supplied to the inhabitants from reservoirs by service-pipes, owned and controlled by private corporations, usually styled "Water Trust Companies;" while in other places the water-works are entirely under the control of the public or municipal authorities. Private water companies generally take out charters and operate thereunder, subject to statutory restrictions. They are usually empowered to lay their pipes in the beds of streets and other public ways, and are licensed to make all necessary repairs to their mains, etc. If companies, having no charter or statutory right to serve water, break up streets or other highways to lay pipes, or otherwise incommode the public, they are liable to indictment or injunction.[1] Such unchartered companies cannot be compelled to supply water to any one on any terms.[2]

§ 196. Property in Water. Strictly speaking, neither light nor water is subject to ownership, and only when an *easement* of use is gained or granted can any property rights therein be claimed. Thus, water is neither land nor tenement, and therefore not covered

[1] Michael & Will on Gas and Water, 72.

[2] Ibid. "A permit to open a street for the purpose of laying a drain is not to be construed as a grant of a right to lay and continue a drain, but simply as a license to disturb the surface of the street." Glasby v. Morris, 3 C. E. Gr. 72.

by a covenant of warranty;[1] but a flow of water conveyed by pipes is a thing which is created and controlled by the parties, and is in its very nature different fram a natural watercourse.[2] So, where one man leased to another "a perpetual privilege to him, his heirs and assigns, forever," the right to lay a pipe one half an inch in diameter from the spring on his land, and from the spring to conduct by such pipe to the dwelling-house of the grantee, with the right to dig a trench in which to lay the pipe, it was held that this was an easement appurtenant to the granted land, and that the grantee had a right to draw all the water that would run through a half-inch pipe continuously, although he might not use the same.[3]

So we may conclude as to water in its natural state, used in connection with the occupation of the soil, as a stream, etc., that the *use* of it may become an incorporeal hereditament, but the water itself is not property. Yet the right to enjoy it in *connection* with the soil may be acquired.[4] The easement in water is gained only where it flows naturally, *without* the art of man, upon land, and does not apply to pipes and drains.[5]

§ 197. Subterranean Watercourses. While it is not within the province of this treatise to enter into a general discussion of the law relating to watercourses, flowing streams, and the use thereof for milling and

[1] Mitchell *v.* Warner, 5 Conn. 518, 524, 526. So an entry on land to take water, and an actual taking of it, do not constitute an eviction, nor does a diversion of water from water-works which renders them useless.

[2] Brakely *v.* Sharp, 1 Stock. 9, 2 Stock. 206.

[3] Bissell *v.* Grant, 34 Conn. 215, 217.

[4] Per Parke, B., Embrey *v.* Owen, 6 Ex. 353; 20 L. J. Ex. 216; Thomas *v.* Brackney, 17 Barb. 654.

[5] Kauffman *v.* Griesemer, 26 Pa. St. 407, 413; Martin *v.* Jett, 12 La. 501.

other purposes, it is nevertheless proper to make mention of such principles of the law as bear upon building operations.

It seems well settled that no action can be maintained for the obstruction of a subterranean stream, though it results in an injury to an adjacent landowner.[1] So where a person by digging a well intercepts from a stream water which would otherwise have flowed into it by percolation through the soil, though such loss of water was a natural effect reasonably to be expected by digging the well;[2] but not if the interference with subterranean water be wantonly or maliciously done to injure the water-supply of his neighbor and not for his own benefit.[3] There may possibly be another exception where the subterranean water is drawn from a stream flowing in a well-known channel,[4] although in such a case the party claiming an interference would have the burden of showing the course of the underground stream.[5]

While water flowing naturally under the ground can be lawfully utilized by the owner of the soil above, if it be introduced into buildings, or harvested in reservoirs, the owner thereof is responsible for whatever

[1] Ellis *v.* Duncan, 21 Barb. 230, S. C. 29 N. Y. 466; Acton *v.* Brundell, 12 Mees. & W. 336; Greenleaf *v.* Francis, 18 Pick. 117.

[2] Chasemore *v.* Richards, 26 L. J. (N. S.) Ex. 393, 29 L. J. (N. S.) Ex. 81, 7 H. L. Cas. 349; Frazer *v.* Brown, 12 Ohio (N. S.), 294; Alexander *v.* U. S., 25 Ct. Claims, 87. See Dexter *v.* R. & O. Mills, 15 N. Y. Suppl. 374. In Trowbridge *v.* Brookline, 144 Mass. 139, 10 N. E. R. 796, the contrary was held under a statute giving damages for injuring "in any manner."

[3] *Contra*, Chatfield *v.* Wilson, 28 Vt. 49. But see Greenleaf *v.* Francis, 18 Pick. 117; Thurston *v.* Hancock, 12 Mass. 221; Panton *v.* Holland, 17 Johns. 92.

[4] Dickson *v.* Grand Junction Canal Co., 7 Exch. 282, 300; Whetstone *v.* Bowser, 29 Pa. St. 59; Wheatly *v.* Baugh, 25 Pa. St. 529.

[5] Hanson *v.* McCue, 42 Cal. 303; Mosier *v.* Caldwell, 7 Nev. 363.

damages it may cause to others by percolation or otherwise, and such liability is not dependent upon proof of negligence;[1] though this is often questioned where a reservoir is sufficiently protected and diligent care has been observed.[2]

§ 198. FALLING WATER. One has no right to construct his house in such a manner that the water will drip from the eaves thereof upon the premises of an adjoining proprietor, but such a right may be given by express grant or acquired by prescription. So, also, a wrongful act may be done by building so near the boundary line that the water from the roof must escape through the neighbor's property.[3] By both the civil and common law, the right to discharge rain-water from a roof over adjoining land could be acquired as any other servitude;[4] but a right to have water drip from eaves does not confer the right to collect it in gutters or spouts, and discharge it in a stream across the land of another;[5] nor can he make any change in the plan of his roof that will further injure the servient estate.[6] Yet the servitude is not lost by tearing down an old house for the purpose of rebuilding on the same general plan, provided the easement does not thereby become more burdensome.[7] On the other hand, a proprietor, having acquired the right of water falling from

[1] Pixley *v.* Clarke, 35 N. Y. 520, 531; Gray *v.* Harris, 107 Mass. 492; Shipley *v.* Fifty Associates, 106 Mass. 194.

[2] Monson *et al.* *v.* Fuller, 15 Pick. 554; Wilson *v.* New Bedford, 108 Mass. 261.

[3] Bellows *v.* Sackett, 15 Barb. 96; Underwood *v.* Waldron, 33 Mich. 232.

[4] 1 Kauf. Mack. § 312; Washb. Easements, 391; Cherry *v.* Stein, 11 Md. 1, 25.

[5] Reynolds *v.* Clark, 2 Ld. Raym. 1399.

[6] Thomas *v.* Thomas, 2 Crompt. M. & R. 34; 2 Fournelle Traité du Voisinage, 115.

[7] Ibid.

his premises upon that of his neighbor, can remove his building, and not be liable to the servient owner for injury as non-user.[1] So where a plaintiff, by erecting a house on his own land, prevented the water falling upon the adjoining lot as it did formerly, it was held that he could not recover for damages thereby occasioned to himself.[2] So, where a person had an easement for a drain, it was held that, though he had a right of entry to make repairs, he had no right to make the burden greater than it was at the time it was granted or acquired.[3] Judge Cooley thus states the law:[4] "If one constructs his buildings so as to cast water therefrom upon the land of his neighbor, he commits an actionable wrong;[5] but if he puts proper eave-troughs or gutters upon his buildings, for leading off the water upon his own ground, and keeps them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances for which no one is in fault; and such injuries must be left to be borne by those on whom they fall."

While no one has a legal right to so construct his house that water therefrom will drip, fall, or run over his neighbor's land, yet the right may be acquired by

[1] Arkwright *v.* Gell, 5 Mees. & W. 203, 233; Wood *v.* Waud, 3 Exch. 748, 778.

[2] Doerbaum *v.* Fischer, 1 Mo. App. 149.

[3] Roberts *v.* Roberts, 7 Lans. 55, S. C. 55 N. Y. 275.

[4] Cooley on Torts, 574. See Norton *v.* Valentine, 14 Vt. 239; Arkwright *v.* Gell, 5 Mees. & W. 203; Underwood *v.* Waldron, 33 Mich. 232.

[5] Citing Baker's Case, 9 Co. 53 b; Jackson *v.* Pesked, 1 M. & S. 234; Tucker *v.* Newman, 11 Ad. & El. 40; Fay *v.* Prentice, 1 C. B. 828; Ashley *v.* Ashley, 6 Cush. 70; Aiken *v.* Benedict, 39 Barb. 400; Shipley *v.* Fifty Associates, 106 Mass. 194.

continued user.[1] The easement, however, only extends with, and is determined entirely by, the user, and may be destroyed entirely by increasing the burden to the servient estate. Thus, while the right will not be lost by altering the house of the dominant tenement, so long as the burden is not increased,[2] the owner of the easement cannot change the direction of his rain-spout,[3] nor so construct it that it will gather a large volume of water to precipitate upon his neighbor's land.[4]

§ 199. Injuries Caused by Water-Pipes and Reservoirs. The English doctrine that he who brings water upon land by artificial means must keep it at his peril, and that injuries occasioned thereby are not excused simply because of the absence of negligence,[5] is not applicable in this country.[6] In England, his only legal excuse, when damage has been occasioned by leakage of his water-pipes or reservoir, is, that the injury was occasioned by the act of God, or *vis major*, or that he was compelled by law to keep water on his premises, and that the injury resulted while performing his duty.[7] On the other hand, in the United States, it has gen-

[1] Sury *v.* Pigott, Palmer, 446; Fay *v.* Prentice, 1 C. B. 828. A continuous flowage of waste water through rain-spouts on adjacent land, for twenty years, does not establish a prescriptive right where the adjacent owner has frequently protested and the wrong-doer has frequently promised to prevent the flowage. Conner *v.* Woodfill, 126 Ind. 85, 25 N. E. R. 876.

[2] Thomas *v.* Thomas, 2 C., M. & R. 34.

[3] 11 Henry, 7, f. 25; Lady Browne's Case, cited in Sury *v.* Pigott, *supra*.

[4] Reynolds *v.* Clarke, 2 Ld. Raym. 399.

[5] Fletcher *v.* Rylands, L. R. 3 H. L. 330, 37 L. J. Ex. 101; Smith *v.* Fletcher, L. R. 7 Ex. 305, L. R. 2 App. Cas. 781, 41 L. J. Ex. 198, 43 L. J. Ex. 70.

[6] Losee *v.* Buchanan, 51 N. Y. 476; Moore *v.* Goedel, 7 Bosw. 591; Killion *v.* Powers, 51 Pa. St. 429.

[7] Nichols *v.* Marsland, L. R. 2 Ex. D. 1, 46 L. J. Ex. 174; Dixon *v.* Metropolitan Board, 7 Q. B. D. 418.

erally been held perfectly lawful for any one to introduce water into his own premises, for domestic or other purposes, by means of pipes, or to erect a reservoir; and, while he is bound to use due diligence and care in regard to such, his liability is dependent upon whether he has or has not exercised due care to protect his neighbor from damage.[1]

It is the duty of the proprietor of a reservoir to see that it is constructed of sufficient strength to stand the pressure of water for which it is intended, to guard against its being surcharged, and to keep it in a safe condition and in proper repair. He is clearly responsible for injuries arising from failure of duty in any of these respects.[2] In the leading English case of *Rylands* v. *Fletcher*[3] it was held that the owner of a reservoir was responsible for injuries caused by the breaking away thereof in consequence of original and latent defects of which the owner was ignorant. How far this rule would be carried in cases of inevitable accident, or where the injury was by the act of God, is doubtful.[4] American cases hold that negligence must be shown to establish liability.[5]

[1] Cases cited, p. 317, note 7; Wendell *v.* Pratt, 12 Allen, 464; Fuller *v.* Chicopee etc., 16 Gray, 46; Everett *v.* Hydraulic Co., 26 Cal. 225.

[2] Pixley *v.* Clark, 35 N. Y. 520; Wendell *v.* Pratt, 12 Allen, 464; Ipswich *v.* County Commissioners, 108 Mass. 33.

[3] L. R. 1 Exch. 265, L. R. 3 H. L. Cas. 330, 339.

[4] Smith *v.* Fletcher, L. R. 7 Exch. 305.

[5] New York *v.* Bailey, 2 Denio, 433; Moore *v.* Goedel, 7 Bosw. 591; Wendell *v.* Pratt, 12 Allen, 464.

CHAPTER XXIV.

GAS.

§ 200. General Statement. Gas, as an artificial light, was hardly known at the beginning of the present century, yet, so economical and advantageous has it proven to be, that now its use is almost universal in cities and towns throughout the world.

§ 201. Gas Companies. Gas is usually served by incorporated companies, having privileges conferred upon them by their charter to break up streets to lay their pipes, etc. While this plan of furnishing gas is usual, it must not be inferred that its manufacture and sale cannot be carried on as any other trade or business. A gas company is not necessarily a public corporation;[1] and, unless the charter under which it operates renders it such, it can discontinue the manufacture at pleasure, and its rights and obligations are controlled by its contracts. It may refuse to supply gas to objectionable persons.[2] We have already seen that a similar rule applies to unchartered water companies.[3]

The gas-works of the city of Philadelphia are practically owned and controlled by the municipal corporation. They were originally constructed by a stock company, but afterwards taken by the city, and the

[1] McCune *v.* Norwich City Gas Co., 30 Conn. 521; Bloomfield & Rochester Natural Gas Co. *v.* Richardson, 63 Barb. 437; N. Y. Cent. R. R. Co. *v.* Metropolitan Gas Co., 63 N. Y. 326; Commonwealth *v.* Lowell Gas Co., 12 Allen, 77.

[2] McCune *v.* Norwich Gas-Light Co., 30 Conn. 521.

[3] *Ante*, § 195, citing Michael & Will on Gas and Water, 72.

stock replaced by a loan issued by the city to the stockholders and made a sinking fund. They are now known as the Gas Trust Works, and are controlled by trustees.[1]

§ 202. Liabilities of Gas Companies. The principle of law, that "those who carry on operations dangerous to the public are bound to use all reasonable precautions," is well settled.[2] The manufacture of gas is clearly such an operation; for gas is both poisonous and explosive. Courts are, therefore, constrained to hold that these companies and their servants are required to exercise more than ordinary care;[3] while statutes have frequently been enacted subjecting the parties to heavy penalties for negligence in this matter.

They are required to keep the gas constantly under their control, and prevent it from escaping into a dwelling;[4] they must keep their pipes and mains in good and sufficient repair, and are liable for any damage occasioned by negligence;[5] they must also promptly investigate defects reported in the pipes of the customers.[6] It seems, however, that their liability to investigate leakages does not apply in the absence of notice, or reasonable chance of knowing, when the escape is from the pipes of a consumer, and not of the company.[7] So, as a gas-light company generally has

[1] Western Saving Fund Society of Philadelphia *v.* Philadelphia, 31 Pa. St. 175.

[2] Blenkiron *v.* Great Cent. Gas Co., 2 F. & F. 440.

[3] Smith *v.* Boston Gas-Light Co., 129 Mass. 318; Emerson *v.* Lowell Gas Co., 3 Allen, 410.

[4] Ibid.

[5] Mose *v.* Hastings Gas Co., 4 F. & F. 324.

[6] Burrows *v.* March Gas Co., L. R. 5 Exch. 67. It is the duty of a gas company to investigate a leak, no matter by whom reported. Hunt *v.* Lowell Gas Co., 3 Allen, 418.

[7] Lannan *v.* Albany Gas Co., 46 Barb. 264, 44 N. Y. 459; Smith *v.* Boston Gas-Light Co., *supra*.

nothing to do with the gas-pipes and the fixtures inside of the meters, except to see that they are tight when the gas is turned on, it was held that a company was not liable for an injury caused by an explosion in the plaintiff's room, occasioned by the negligence of a person permitted by the company to turn on the gas after fittings had been made.[1] So the rule in *Rylands* v. *Fletcher*[2] does not apply, a gas company not being liable for damages caused by a leak from their pipes without evidence of negligence on their part.[3]

§ 203. Damages Occasioned in Laying Gas-Pipes. Gas companies, though empowered by their charters to tear up streets for the purpose of laying pipes and mains, must, in doing so, do as little damage as possible, and make fair compensation therefor.[4] So, where a company dug a trench in a street, and had it filled up, but heavy rains so affected the filling that the plaintiff fell into the trench and was injured, the court held that the company was liable for imperfectly filling up the trench, and that, "although work be approved of and accepted by the officials of a city, it is not only the duty of the company to put the streets in as good condition as before, but also to exercise a careful foresight so as to prevent any injury afterward which might be occasioned to the work by storms and rainfalls."[5] The question of due care is for the jury.[6] It has been held

[1] Flint *v.* Gloucester Gas-Light Co., 3 Allen, 343, 9 Allen, 552; Lannan *v.* Albany Gas Co., 46 Barb. 264, 44 N. Y. 459. Not liable without notice of leak. Holly *v.* Boston Gas-Light Co., 8 Gray, 123.

[2] Rylands *v.* Fletcher, as cited *ante*, § 199, L. R. 1 Ex. 265.

[3] Strawbridge *v.* City of Phila., 13 Reporter, 216; Holly *v.* Boston Gas-Light Co., 8 Gray, 123; Smith *v.* Boston Gas-Light Co., 129 Mass. 318.

[4] London & Blackwall Ry. Co. *v.* Limehouse, 26 L. J. Ch. 164; Michael & Will on Gas and Water, 15.

[5] Dillon *v.* Washington Gas-Light Co., 1 MacArthur (D. C.), 626.

[6] Butcher *v.* Providence Gas Co., 12 R. I. 149.

in England to be an indictable nuisance to obstruct a public highway;[1] but it seems that the "disturbance of the pavement of a town by an unincorporated gas company, without lawful authority, for the purpose of laying down pipes, is not a nuisance so serious and important that a court of equity will interfere by injunction."[2] So an injunction was refused where an old gas company claimed an exclusive easement, and sought to restrain a new company from laying its pipes.[3] But an injunction was granted in New Jersey, where a new company had existence only under a general statute, on the ground that the State alone could confer the right to break up its streets.[4] In Philadelphia an injunction to prevent a new company from laying pipes was refused, and it was held that the municipality had power to make reasonable regulations.[5]

A gas company cannot lay pipes or introduce gas into a private way or building without permission from the owner thereof.[6] So a local board cannot fix a gas-lamp to a private house without permission.[7]

§ 204. Authority for Laying Gas-Pipes. It seems that only the legislature of a State can grant the privilege to a gas company to tear up streets and other highways for the purpose of laying pipes and mains.[8]

[1] Reg. v. London Gas Co., 2 El. & El. 650, 8 Gas J. 165.

[2] Atty. Gen. v. Cambridge Consumers' Gas Co., L. R. 4 Chan. 71, 17 Gas J. 429, 593, 867; Atty. Gen. v. Sheffield Gas Co., 3 De G., McN. & G. 304. But see *contra*, City of Brooklyn v. Fulton Municipal Gas Co., 7 Abb. N. C. 19.

[3] Sheffield United Gas Co. v. Sheffield Consumers' Co., 2 Gas J. 360. See Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505.

[4] Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242.

[5] Commissioners etc. v. North Liberties Gas Co., 12 Pa. 318; Strawbridge v. City of Phila., 13 Rep. 216.

[6] Thompson v. Sunderland Gas Co., L. R. 2 Ex. D. 429.

[7] Meek v. Landon, 37 L. T. 181.

[8] State of Ohio v. Cincinnati Gas-Light & Coke Co., 18 Ohio St. 262;

The city council of a city has no such authority, unless conferred upon it by statute.[1]

In the language of Van Fleet, V.-C., "The right to use the public street for the purpose of laying gas-pipes therein is a franchise which the State alone can confer."[2] In an Ohio case, where the charter of a gas company reserved the right of the legislature to "alter, modify, or repeal" the same, it was held that the legislature could give to the city council of the city in which the gas company was situated, by subsequent acts, the right to regulate by ordinance, from time to time, the price of gas to be charged by such gas company, and that the gas company was bound by said ordinance.[3] Yet it seems that this power must be exercised in good faith, and for the purpose of limiting the gas company to a fair price; and "it is competent for the company to show that the ordinance was passed for a fraudulent purpose," or to compel the gas company to furnish gas for a price so low that the city might take advantage of the injury thereby resulting to purchase the works.[4]

When the right has been conferred upon a chartered gas company to lay pipes in the streets of a city, they are the owners of an easement therein, and not of a mere license.[5] But the use of a street by a gas company for twenty years, by permission of a city council,

Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242; Boston Gas-Light Co. *v.* Richardson, 13 Allen, 160.

[1] State of Ohio *v.* Cincinnati Gas-Light & Coke Co., 18 Ohio St. 262; Norwich Gas-Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

[2] Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242.

[3] State of Ohio *v.* Cincinnati Gas-Light & Coke Co., *supra*.

[4] Ibid.

[5] Providence Gas Co. *v.* Thurber, 2 R. I. 15; People *ex rel.* Maybury *v.* Mutual Gas-Light Co. of Detroit, 38 Mich. 154.

does not imply a right to exclusive use.[1] Yet, when the consent of local authorities has once been given to breaking up streets, it is good for all time.[2]

§ 205. LARCENY OF GAS. Illuminating gas, like any other commodity, may be the subject of larceny.[3] So, where a person secretly opened a service-pipe belonging to a gas company, and connected the same with another pipe, through which he received and used the company's gas, the court held the offence to be larceny, and not embezzlement.[4] On the other hand, on the trial of an indictment under a New York statute, which made it a misdemeanor to connect gas-pipes in the street and building, or to take gas without passing through the meter, it was held that, "to convict, the prosecution must prove: 1st. The incorporation of the gas-light company; 2d. That the company was supplying gas; 3d. That a meter was by it provided; 4th. That the defendant connected a pipe, with which he supplied the burners of his house, with the company's service-pipe, in such a manner as to supply his burners without passing through the meter, with the intention of injuring or defrauding the company."[5] So, in an English case, where the defendant bored certain pipes, and used the plaintiff's gas for a period of six years.[6]

§ 206. CONVERSION OF GAS. In an action for the conversion of a quantity of gas, and for the price of gas

[1] State of Ohio *v.* Cincinnati Gas-Light & Coke Co., 18 Ohio St. 262.

[2] Dover Gas-Light Co. *v.* Mayor of Dover, 7 De G., M. & G. 545.

[3] Commonwealth *v.* Shane, 4 Allen, 308; Reg. *v.* White, 20 Eng. L. & Eq. 585, 22 Law J. N. S. 123. So where the gas was stolen through an india-rubber tube. Reg. *v.* Mitchell, 22 Gas J. 137; Reg. *v.* Jenkins, 5 Gas J. 214.

[4] Ibid.

[5] People *v.* Wilber, 4 Parker's Crim. C. 19.

[6] Imperial Gas-Light & Coke Co. *v.* London Gas-Light Co., 10 Exch. 39, 28 Eng. L. & Eq. 425, 3 Gas J. 483.

sold and delivered to the defendant, it appeared that in some way the meter in the defendant's premises had tilted over, so that the water ran out and gas passed through without being registered. Suit was brought to recover the price of the estimated amount of gas which passed through, while the defendant held that he was only liable for the amount actually registered. The verdict was for the plaintiff.[1]

§ 207. FIXTURES. Authorities are conflicting whether gas-pipes, mains, chandeliers, etc., are personal property or fixtures, and therefore part of the realty to which they are attached. Thus, gas-burners have been declared to be fixtures;[2] so of chandeliers when affixed with screws;[3] so of gasoliers.[4] But these conclusions have been denied in strongest terms,[5] and pendent gas-burners,[6] brackets,[7] and chandeliers,[8] gas-pipes,[9] and even mains,[10] have been held not to be fixtures, but personal property. But mains laid in a street have been

[1] Victoria Docks Gas Co. *v.* Burton, 16 Gas J. 103. The fact that a consumer is in arrears for his gas bill, and liable to have the gas cut off, does not affect his right to recover against the gas company for negligent management. Alexandria etc. Co. *v.* Painter (Ind. App.), 28 N. E. R. 113.

[2] Keeler *v.* Keeler, 31 N. J. Eq. 191. See *ante*, Ch. XX., Fixtures.

[3] Johnson's Executors *v.* Wiseman's Executors, 4 Metc. (Ky.) 357.

[4] Sewell *v.* Angerstein, 18 Law Times (N. S.), 300.

[5] Vaughen *v.* Haldeman, 33 Pa. St. 522; Guthrie *v.* Jones, 18 Mass. 191; Penn Mutual Life Ins. Co. *v.* Thackera, 13 Reporter, 733; Montague *v.* Dent, 10 Richardson (So. Ca.), 135; Rogers *v.* Crow, 40 Mo. 91.

[6] Montague *v.* Dent, *supra*.

[7] Towne *v.* Fiske, 127 Mass. 125.

[8] Ibid., and Elliot *v.* Bishop, 10 Exch. 512; Lawrence *v.* Kemp, 1 Duer, 363; Shaw *v.* Lenke, 1 Daly (N. Y.), 487.

[9] Walls *v.* Hinds, 4 Gray, 256; Gas Co. *v.* Charter Oak Ins. Co., 19 Albany Law Journal, 501. *Contra*, Smyth *v.* Sturges, 108 N. Y. 495, 15 N. E. R. 544.

[10] People *ex rel.* Citizens' Gas-Light Co. of Brooklyn *v.* Assessors, 6 N. Y. Trans. App. 116; Memphis Gas-Light Co. *v.* State, 6 Cold. (Tenn.) 310.

considered realty.[1] Gas fixtures have been held not to be subject to mechanic's lien.[2]

§ 208. GAS NOT A NECESSITY. Gas has been held not to be a necessary of life, with reference to the law rendering a husband liable for his wife's necessaries.[3]

§ 209. LIABILITY OF GAS COMPANIES FOR REFUSING TO FURNISH GAS. We have already seen that gas companies are not public corporations,[4] and therefore, *when their charter contains no provision* compelling them to supply all persons making application therefor, they are under no obligation at common law to supply it.[5] Neither are they when the charter is permissive only.[6] But it frequently happens that a general statute provides penalties for a refusal on their part to sell gas to persons applying.[7] So a gas company, which has an exclusive right to manufacture and sell gas in a city, has been held bound to furnish it to any person who has made the necessary preparations to receive it, and is liable for damages for refusal.[8] Nor can it refuse on the ground that the former owner of the same building failed to pay his gas bill,[9] or that the applicant paid on one house and failed to pay on another.[10]

[1] Capital City Gas-Light Co. *v.* Charter Oak Ins. Co., 51 Iowa, 31; Providence Gas Co. *v.* Thurber, 2 R. I. 15.

[2] Jarechi *v.* Philharmonic Society, 79 Pa. St. 403.

[3] Kettening Gas Co. *v.* Leach, 24 Gas J. 503.

[4] *Ante*, § 201, citing authorities.

[5] McCune *v.* Norwich City Gas Co., 30 Conn. 521; Hoddeson Gas & Coke Co. *v.* Haselwood, 6 Com. B. (N. S.), 238, 8 Gas J. 261; Commonwealth *v.* Lowell Gas-Light Co., 12 Allen, 75; Houlgate *v.* Surrey Consumers' Gas Co., 8 Gas J. 261; Ferguson *v.* Gas-Light Co., 37 How. Pr. 189.

[6] Patterson Gas-Light Co. *v.* Brady, 27 N. J. 245, 3 Dutch. 245; Pudsey Coal Gas Co. *v.* Corporation etc., L. R. 15 Eq. 167, 22 Gas J. 54.

[7] Pearson *v.* Phœnix Gas Co., 12 Gas J. 69.

[8] Sheppard *v.* Milwaukee Gas-Light Co., 6 Wis. 539.

[9] New Orleans Gas-Light & B. Co. *v.* Paulding, 12 Robinson (La.), 378.

[10] Gas-Light Co. of Baltimore City *v.* Colliday, 25 Md. 1.

Mandamus will lie to compel a gas company to supply those who offer to comply with its rules, but not to furnish gas to a person whose former bills are unpaid.[1] But where the plaintiff occupied one floor of a tenement house, the owner of which had applied for separate meters for each floor, which the defendants refused on the ground that he had not put up a separate service-pipe, it was held that the company was not liable, under the New York law,[2] for refusing to furnish gas, as it was already in the building.[3]

§ 210. Regulations Imposed by Gas Companies. It seems that gas companies have a perfect right to make suitable rules and regulations under which they supply customers;[4] for instance, they can stipulate that their agents or servants shall be allowed free access to the meter, impose penalties for damages to their property or alterations of their pipes, require deposits from customers, but doubtful whether they can compel the consumer to sign a written agreement.[5]

In *Wright* v. *Colchester Gas Company*[6] the plaintiff sued in trespass to recover for an entry on his premises by the gas company, who entered to cut off the gas. It appeared that the plaintiff had made a suitable deposit, but, as the company did not pay him interest thereon, he refused to pay more than the balance of the gas bill above the deposit, whereupon a new deposit was demanded by the gas company and the gas cut off shortly afterwards. The plaintiff had signed an

[1] People *ex rel.* Kennedy *v.* Manhattan Gas-Light Co., 45 Barb. 136, 30 How. Pr. 87.

[2] N. Y. St. Laws, 1859, § 6, p. 698.

[3] Ferguson *v.* Metropolitan Gas-Light Co., 37 How. Pr. 189.

[4] Sheppard *v.* Milwaukee Gas-Light Co., 6 Wis. 539.

[5] Sheppard *v.* Milwaukee etc., *supra.*

[6] Wright *v.* Colchester Gas. Co., 30 Gas J. 336.

agreement to allow the defendant's employees access to the house for any purpose connected with the gas-pipes, but he swore he had never read the agreement and did not know what it contained. It was held that the company was authorized to demand pecuniary security, and that the plaintiff was bound by the agreement he had signed.

CHAPTER XXV.

ROADS, ALLEYS, AND OTHER WAYS.

§ 211. DEFINITION. Any road, street, alley, avenue, lane, or other way over which the public enjoys a right of walking, driving, or travelling, is a highway. The channel of a navigable river or other body of water, being open and free to all persons who choose to travel upon it, is also, though rather figuratively, regarded as a public highway.

It has been frequently contended that it is essential that a highway, to be legally such, must be a thoroughfare, that is, a road connecting other roads, or leading to some public place; but the preponderance of authority is, that it matters not where it begins or ends, whether it leads from one road to another,[1] or for what other purpose it is used, so long as it is open and free to all passengers, and adapted to purposes of travel and controlled by the public authorities.[2]

There is an old English maxim, "Once a highway, always a highway," which legally holds good whether the public acquired the right by prescription, dedication, or by statutory regulations. The public have an absolute right to use every part of it, and to pass to and fro in all directions, the only limitations being those imposed by certain well-known rules as to "giving and taking the road," etc.

The owner of the land adjoining a street, alley, or

[1] 1 Hawk. P. C. ch. 76, p. 81; Rex v. Cumberworth, 3 B. & Ad. 108.
[2] State v. Trask, 6 Vt. 355.

public highway usually owns the fee to the centre thereof;[1] but the easement of the highway is in the public, and the title of the adjacent owner only technical.[2]

§ 212. RESERVATIONS. Technically, a way cannot be created by exception or reservation, for it "is neither a parcel of the thing granted, nor does it issue out of the thing granted."[3] It previously had no existence, while a reservation must be parcel of the thing demised. It is common, however, for the vendor or lessor of land to reserve a moiety of the land sold or leased, for the purpose of roadways or drains. The right thus acquired is not, strictly speaking, a reservation, but an easement newly created by way of the grant from the grantee.[4] Various interests may be thus reserved, such as a reservation of minerals;[5] exclusive use of sewers;[6] or certain roads;[7] or the mutual right of adjoining tenants to pass over each other's lands.[8]

The law presumes a reservation over a part of land conveyed, where such a way is necessary to the proper use and enjoyment of the part retained, unless there be something in the instrument of conveyance to negative such a presumption.[9] So, where a purchaser of

[1] Hannibal Bridge Co. *v.* Schaubacher, 57 Mo. 582.

[2] Morris & Essex R. R. Co. *v.* Newark, 2 Stock. 352.

[3] Washb. on Easements, 20.

[4] Ibid., citing Durham & Sund. R. R. Co. *v.* Walker, 2 Q. B. 940; Wickham *v.* Hawkes, 7 Mees. & W. 76; Doe *v.* Lock, 2 Adolph. & E. 705.

[5] Nicol *v.* Beaumont, 53 L. J. Ch. 853, 50 L. T. 112; Reg. *v.* United Kingdom Tel. Co., 31 L. J. M. C. 166.

[6] Lee *v.* Stevenson, El., Bl. & El. 512, 27 L. J. Q. B. 263.

[7] Nicol *v.* Beaumont, *supra*.

[8] Smith *v.* Higbee, 12 Vt. 113.

[9] Wheeldon *v.* Burrows, L. R. 12 Ch. D. 31: Corp. of London *v.* Riggs, L. R. 13 Ch. D. 798. In Rightsell *v.* Sale, 90 Tenn. 556, 18 S. W. R. 245, the court held on the facts that a purchaser was charged with notice of a way used for twenty years by the grantor over the land sold as appurtenant to the portion of the premises not sold by him.

land had notice that his vendor intended to lay out the remaining land in buildings, built upon such a plan that a right of way over the tract sold would be essential, the court held the right of way acquired through necessity.[1]

§ 213. PRIVATE WAYS. Where the right of way is used in common by a number of land-owners or their tenants, and does not belong to the public generally, it is called a private way. Parties holding such a right of way have it only as an easement, for it is not an interest in the land.[2] It may arise by implication as a way of necessity; as where a grantee receives land so surrounded by other land of the grantor that it was secluded from any public highway. Where land is granted from which there is no egress to the highway, except by a private way over the adjacent land of the grantor, the grantee obtains an easement over such land as a way of necessity.[3]

[1] Davies *v.* Sear, L. R. 7 Eq. 427.

[2] Godley *v.* Frith, Yelv. 15; Snyder *v.* Warford, 11 Mo. 513; Hewlins *v.* Shippam, 5 B. & C. 221.

[3] Barnard *v.* Lloyd, 85 Cal. 131, 24 Pac. R. 658. See Ellis *v.* Bassett, 128 Ind. 118, 27 N. E. R. 344; Chase *v.* Hall, 41 Mo. App. 15; Whitehouse *v.* Cummings, 83 Me. 91, 21 Atl. R. 743; Richards *v.* Attleboro, Branch R. Co., 153 Mass. 120, 26 N. E. R. 418; Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. R. 632; Fischer *v.* Laack, 76 Wis. 313, 45 N. W. R. 104; Smith *v.* Griffin, 14 Colo. 429, 23 Pac. R. 905; Kripp *v.* Curtis, 71 Cal. 62, 11 Pac. R. 879; Ward *v.* Robertson, 77 Iowa, 159, 41 N. W. R. 603; Russell *v.* Napier, 82 Ga. 770, 9 S. E. R. 746; Bonelli *v.* Blakemore, 66 Miss. 136, 5 So. R. 228; Bond *v.* Willis, 84 Va. 796, 6 S. E. R. 136; Mead *v.* Anderson, 40 Kan. 203, 19 Pac. R. 708.

The general principles governing the easement of a way apply to passages in buildings by way of stairs, halls, and the like. The grant of a right to construct a stairway against a partition wall precludes the grantor from changing the building so as to alter the stairway. Haslett *v.* Shepherd (Mich.), 48 N. W. R. 533. Where it was apparent to one leasing a first floor that the only stairway and elevator for reaching the upper stories were approached through the first floor, the lessee was held to take it subject to a way of necessity to the upper floors. Benedict *v.* Barling, 79 Wis.

§ 214. New Streets, Alleys, and Private Ways. In the improvement of town lots by the erection of buildings in rows, it is usual for the land proprietor or his builder to lay off the entire plat so that the occupants of the various buildings may have the use in common of alleys, drains, and sewers. In this manner streets and private ways are established at places where none were established under the authority of the municipality. The lots conveyed by deeds which bound them on such streets give the purchasers, by virtue of an implied covenant, an easement or right of way over the streets. Where land is sold in several parcels, and a street is indicated upon the plan as existing, purchasers upon the faith of the plan acquire the right as against the grantor and each other to treat it as a street, even though it has never been accepted or used by the public.[1] So, where the owner of a block of houses made partition of it, and in each deed made an alley, running through the block, one of the boundaries of the lots,

551, 48 N. W. R. 670. In Geible *v.* Smith, 146 Pa. 276, 23 Atl. R. 437, the northern half of a building was sold, including the hall on the second floor and the stairway to the street; it was held that the purchaser of the southern half had by implication a right of way for second-floor tenants through this hall and down the stairway to the street, such egress having been the customary and only possible one for such tenants. See Nat'l Exchange Bk. *v.* Cunningham, 46 Ohio St. 575, 22 N. E. R. 924; Howell *v.* Estes, 71 Tex. 690, 12 S. W. R. 62 (where a reservation in favor of the lessor was implied). Where one intending to build agreed with the adjoining owner to build a hall on the second floor "running to rear end of the building" for joint use with the adjoining owner, it was held that the hall must be extended through an addition subsequently built on at the rear. Price *v.* Baldauf, 82 Iowa, 669, 46 N. W. R. 983.

[1] Dill *v.* Board, 47 N. J. Eq. 421, 20 Atl. R. 739; White *v.* Flannigan, 1 Md. 540; *In re* Ladue, 118 N. Y. 213, 23 N. E. R. 465. A deed conveying land expressly bounded by the line of a highway, the fee of which is in the grantor, impliedly grants an easement of light, air, and access in the adjoining half of the highway, of which the grantor cannot, after the discontinuance of the highway, deprive the grantee. Holloway *v.* Delano, 18 N. Y. S. 704, 28 Abb. N. C. 190.

each grantee was held to be entitled to a private right of way in such alley, and might be allowed to maintain an action for the disturbance of such right.[1] So the purchaser of a lot described as bounding upon a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions, but only until it reaches some other street or public highway.[2]

Where there is an express covenant of the vendor or lessor to make new roads or alley-ways in accordance with a building scheme, and the intention of the parties is further shown by the plans and drawings, the vendee or lessee can compel the vendor or lessor to make all the roads agreed upon, not only over part of the land, but all of it, according to the usual construction of contracts.[3] Such covenants are sometimes made by the lessee, and it often occurs that he gives the lessor power to make the roads at his expense, should he (the lessee) fail to do so.

The vendor or lessor will not, however, be bound, by the mere exhibition of the plan, to make *new* roads, or improvements shown thereon;[4] but if the roads are

[1] Curlin *v.* Paul, 11 Mo. 32. See Zell *v.* Society, 119 Pa. 390, 13 Atl. R. 447.

[2] Hawley *v.* The Mayor etc., 33 Md. 270; McCormick *v.* The Mayor etc., 45 Md. 512. In a Pennsylvania case, where the land granted bounded on a street which never had existence except on paper, and the owner of the soil built thereon and had exclusive possession for twenty-one years, it was held that no action for obstruction thereof would lie against him. Spackman *v.* Steidel, 88 Pa. St. 453.

[3] Mason *v.* Cole, 4 Exch. 375, 18 Taunt. L. J. Ex. 478. In this case the land proprietor was held bound to make good and sufficient roads, not only up to the plaintiff's house, but over the whole land, as contemplated in the agreement, although no other houses than the plaintiff's had been built.

[4] Feoffees of Heriot's Hosp. *v.* Gibson, 2 Dow, 301; Nurse *v.* Lord Seymour, 13 Beav. 269; Nicholson *v.* Rose, 4 De G. & J. 10; Eastwood *v.* Lever, 4 De G., J. & S. 114.

also mentioned in the deed of conveyance, though they be not yet made, the deed and plan together may act as a grant of the ways.[1] So, while a reference in the deed to an *intended* way, without an express grant, will not pass such way,[2] yet its locality may afterwards become fixed by acquiescence of the parties.[3]

This right is strictly an easement over the soil, and not an interest in the land.[4] The easement, however, is as much property as the lot itself, and the land-holder is as much entitled to protection in the enjoyment thereof as he is in the enjoyment of the land itself.[5]

§ 215. PRESCRIPTION. Both public and private ways may be gained by prescription.[6] The uninterrupted use of a highway by the public for the period of twenty years or more is sufficient to gain an easement over it, as by prescription.[7] The user under which a way is gained determines its character and extent;[8] but in cases of express grants, the terms of the grant, when clear and definite, will not be affected by user. Ways gained by prescription, and those acquired by dedication, are almost identical, particularly where dedication is implied from continued user. Strictly speaking, a way gained by prescription, though by a corporate body, is a private easement, and limited to the use of those by whom gained.[9] In such cases a grant of

[1] Harding *v.* Wilson, 2 Barn. & Cr. 96; Brett *v.* Clowser, L. R. 5 C. P. D. 376. But see Glave *v.* Harding, 27 L. J. Ex. 292.

[2] Harding *v.* Wilson, *supra;* Roberts *v.* Karr, 1 Taunt. 495.

[3] Bannon *v.* Angier, 2 Allen, 128; Wynkoop *v.* Burger, 12 Johns. 222.

[4] Godley *v.* Frith, Yelv. 15; Hewlins *v.* Shippam, 5 B. & C. 221.

[5] Thurston *v.* St. Joseph, 51 Mo. 510.

[6] Washb. on Easements, 73; 3 Dane Abr. 55.

[7] Commonwealth *v.* Low, 3 Pick. 408; State *v.* Green, 41 Iowa, 693; Folger *v.* Worth, 19 Pick. 108.

[8] Ballard *v.* Dyson, 1 Taunt. 279; Bower *v.* Hill, 2 Bing. N. C. 339.

[9] Washb. on Easements, 125; Commonwealth *v.* Newbury, 2 Pick. 51.

the way is presumed, and therefore gives no right of passage to any but inhabitants of the town;[1] yet, generally, it may be said to be conclusively settled that *public* highways may be gained by immemorial usage.[2]

The States generally have statutes prescribing that roads which have been continuously used for a period of twenty years or more shall be deemed highways.[3]

§ 216. DEDICATION. The grant of a way may be implied from proof showing that the public have, from time immemorial, or for more than twenty-one years, with the owner's consent, enjoyed a right of way over his lands.[4] The law presumes that he dedicated or made a present of it to the public by some lost grant. Like prescription, it may be presumed from non-user. Dedication is defined by Mr. Angell[5] as "an appropriation of land to some public use, made by the owner of the fee and accepted by or on behalf of the public." Mr. Thompson[6] calls it "an act by which the owner of the fee gives to the public an easement in his land."

It is to be observed that the act of dedication can only be made by the owner of the fee;[7] and it must

[1] Commonwealth *v.* Low, 3 Pick. 408; Smith *v.* Kinard, 2 Hill (S. C.), 642; Green *v.* Chelsea, 24 Pick. 71.

[2] Commonwealth *v.* Low, *supra;* Folger *v.* Worth, 19 Pick. 108; Nash *v.* Peden, 1 Speers, 17; Ely *v.* Parsons, 55 Conn. 83, 10 Atl. R. 499; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. R. 484; Irving *v.* Ford, 65 Mich. 241, 32 N. W. R. 601; McKay *v.* Doty, 63 Mich. 581, 30 N. W. R. 591.

[3] N. Y. R. S. 521, § 100.

[4] Dedication presumed where public use of a way was allowed by various *tenants*, and not objected to by *landlord*, for a period of fifty years. Rex *v.* Barr, 4 Campb. 16; Wellbeloved on Highways, p. 61; Davis *v.* Stephens, 7 Carr. & Payne, 570.

[5] Angell on Highways, § 132.

[6] Thompson on Highways, 3d ed. § 53.

[7] Post *v.* Pearsall, 20 Wend. 442; Wood *v.* Veal, 5 Barn. & Ald. 459; Hoole *v.* Atty. Gen., 22 Ala. 190. Not by trespasser or tenant. Washburn on Easements, 180. Nor ninety-nine-year lessee. Wood *v.* Veal, *supra.*

be for a *public* use: there can be no such thing as dedication for a private use.[1] The title to the land still remains in the owner of the fee, his act being only the gift of an easement or right of way.[2]

The land proprietor may dedicate the use of his land to the public by an overt act, that is to say, by an express voluntary donation which will be completed by the acceptance of the public;[3] or he may do so by simply allowing the public to use it for purposes of travel for such a length of time that there may be implied an intention on his part to give it an irrevocable license to do so.[4] It needs no instrument in writing to perfect an act of dedication;[5] it may be by acts *in pais*, and, when once made and accepted by the public, it is in its nature irrevocable,[6] even to a town not yet incorporated.[7]

There must be an intention — on part of the owner — to present the way to the public to constitute it a highway.[8] For example, in *Commissioner* v. *Riker*[9] the owner showed that the use of the way for the prescriptive period had been allowed by him, under an agreement with the authorities, during the continuance of

[1] Commonwealth v. Newbury, 2 Pick. 57; Lawton v. Tison, 12 Rich. 88; Washb. on Easements, 129; Hale v. McLeod, 2 Metc. (Ky.) 98.

[2] Post v. Pearsall, 22 Wend. 451; Kelsey v. King, 33 How. 39. The owner may still use it in any way not inconsistent with the public's rights. Hunter v. Trustees of Sandy Hill, 6 Hill, 411.

[3] Green v. Chelsea, 24 Pick. 71; Child v. Chappell, 5 Seld. 256, 9 N. Y. 257.

[4] Poole v. Huskinson, 11 M. & W. 827; Surrey Canal Co. v. Hall, 1 M. & Gr. 392.

[5] Hunter v. Trustees of Sandy Hill, 6 Hill, 407.

[6] State v. Trask, 6 Vt. 355; New Orleans v. U. S. 10 Pet. 662; Ragan v. McCoy, 29 Mo. 356.

[7] 2 Smith Lead. Cas. 5th ed. 209; Cincinnati v. White, 6 Pet. 431.

[8] Poole v. Huskinson, 11 Mees. & W. 827; Stacey v. Miller, 14 Mo. 478.

[9] 79 Mich. 551, 44 N. W. R. 955.

a defect in the highway, and had continued on the faith of promises by the authorities to restore it; this was held to rebut the appearance of adverse usage or of dedication. In *State* v. *Waterman*[1] the mistake of a land-owner in supposing that a certain travelled way on his land had been duly established by authority was held not sufficient to destroy the effect of his acquiescence in the public use of it. But in *Bolton* v. *McShane*,[2] where private land was used by all under a mistake as to the highway boundary, it was held that the owner had not lost the right to reclaim his land. So, where parties have left uninclosed strips of land bordering upon highways, they are at liberty to take them for building purposes, no matter how long they have remained open, provided no intention to dedicate can be shown.[3] Mere acquiescence by the owner in the use by certain persons of a convenient path is not sufficient evidence of dedication.[4] But there must at least have been knowledge and acquiescence.[5] It is generally for the jury to determine whether the evidence is sufficient to show the intention of the owner of the land to dedicate the use of it to the public.[6] Dedication is a question of fact, to be determined upon all the circumstances.[7]

[1] 79 Iowa, 360, 44 N. W. R. 677.

[2] 79 Iowa, 26, 44 N. W. R. 211.

[3] Gowen *v.* Philadelphia Exc. Co., 5 Watts & S. 141.

[4] Worthington *v.* Wade, 82 Tex. 26, 17 S. W. R. 520. See § 217, *infra*; Witter *v.* Damitz, 81 Wis. 385, 51 N. W. R. 575; Moffet *v.* Com'rs, 138 Ill. 620, 28 N. E. R. 975; Gerberling *v.* Wunnenberg, 51 Iowa, 125, 49 N. W. R. 861.

[5] Hope *v.* Barnett, 78 Cal. 9, 20 Pac. R. 245; Howard *v.* State, 47 Ark. 431, 2 S. W. R. 331; McCarly *v.* Lemennier, 40 La. Ann. 253, 3 So. R. 649.

[6] Gould *v.* Glass, 19 Barb. 171, 195. It seems, however, that, from use and occupation for over twenty years, the grant may be presumed. 3 Kent Com. 451; McManus *v.* Butler, 51 Barb. 436.

[7] Hartford *v.* R. Co., 59 Conn. 250, 22 Atl. R. 37.

A married woman, though she cannot convey her estate, may have a dedication of a right of way over it presumed against her.[1] There need not be any specific grantee *in esse* at the time, to whom the fee could be transferred.[2] Under the New York statute it has been held that a way used by the public for twenty years may be deemed a public highway, though the owner be an infant, married woman, or lunatic.[3]

There must, however, be an acceptance of the way on the part of the public;[4] but the acceptance may be at any time before the tender is withdrawn by the owner of the fee.[5] No matter for what period of time a private way, clearly intended as such, may be used by persons other than those for whom it was granted, it will not become a highway.[6]

Dedication need not be absolute, that is to say, the act may be qualified, or certain reservations made. Thus, the owner of a fee may dedicate a roadway to the public for special purposes, as to be used as a foot-path, carriage-way, a public square,[7] and public com-

[1] Schenley *v.* Commonwealth, 36 Pa. 29; Ward *v.* Davis, 3 Sandf. 502.

[2] Warren *v.* Jacksonville, 15 Ill. 236.

[3] Davenpeck *v.* Lambert, 44 Barb. 599.

[4] Niagara Suspension Bridge *v.* Buchanan, 66 N. Y. 261; Field *v.* Manchester, 32 Mich. 279; Bartlett *v.* Bangor, 67 Me. 460; Fox *v.* Union Sugar Refinery, 109 Mass. 292; State *v.* Trask, 6 Vt. 355; Cincinnati *v.* White, 6 Peters, 431. But no formal act of acceptance is necessary. It is enough that the public travel over it. People *v.* Davidson, 79 Cal. 166, 21 Pac. R. 538; State *v.* Birmingham, 74 Iowa, 407, 38 N. W. R. 121. But see Irving *v.* Ford, 65 Mich. 241, 32 N. W. R. 601. Public work done on it may suffice. State *v.* Eisele, 37 Minn. 256, 33 N. W. R. 785; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. R. 43; Lake View *v.* Lebohn, 120 Ill. 92, 9 N. E. R. 269; Rathmann *v.* Nohrenberg, 21 Neb. 467, 32 N. W. R. 305; Morse *v.* Leize, 34 Minn. 35, 24 N. W. R. 287; State *v.* Proctor, 90 Mo. 334, 2 S. W. R. 472; Ball *v.* Cox, 29 W. Va. 407, 1 S. E. R. 673; Hoadley *v.* San Francisco, 70 Cal. 320, 12 Pac. R. 125.

[5] Simmons *v.* Cornell, 1 R. I. 519.

[6] Hale *v.* McLeod, 2 Metc. (Ky.) 98.

[7] Cincinnati *v.* White, 6 Pet. 431.

mons,[1] but there cannot be a dedication to part of the public.[2] Neither can a person reserve the right of making cuts through a way for purpose of draining after dedication.[3] But a land-owner may dedicate a way, and reserve the right to have doorsteps or cellar-flaps and shutters projecting;[4] or to keep a gate across it;[5] or to have a stile projecting;[6] or to have coal-chutes and steps in it.[7]

As has been said before, the land-owner does not part with his title to the fee upon dedicating a highway over it to the public: he still retains the right to make any use of it he chooses, provided he does not interfere with the uses for which it was dedicated.[8] Nor does he thereby bind himself to keep it in *repair*,[9] for, if the public accept and use a highway, they must keep it in repair.[10] Nor can adjoining owners be compelled to bear the expense of keeping it in repair: it must be done by the public at large.[11]

§ 217. DEDICATION IMPLIED, WHEN. We have already remarked that the act of dedication is not within the Statute of Frauds, and therefore may either be formally made in writing, or informally made without writing

[1] Watertown *v.* Cowen, 4 Paige, 510.

[2] Poole *v.* Huskinson, 11 Mees. & W. 827; Hemphill *v.* City of Boston, 8 Cush. 195.

[3] Rex *v.* Leake, 2 Nev. & Man. 595.

[4] Fisher *v.* Prowse, 31 L. J. Q. B. 213; Irvin *v.* Fowler, 5 Robt. (N. Y.) 482.

[5] James *v.* Hayward, Cro. Car. 184.

[6] Ibid.

[7] Fisher *v.* Prowse, *supra*.

[8] Abbott *v.* Mills, 3 Vt. 521; Hobbs *v.* Lowell, 19 Pick. 405; Ellsworth *v.* Lord, 40 Minn. 337, 42 N. W. R. 389; People *v.* Moore, 50 Hun, 356, 3 N. Y. Suppl. 159 (the owner may not keep out tradesmen delivering wares, in order to establish a monopoly for other tradesmen).

[9] Reg. *v.* Lordsmere, 19 L. J. M. C. 210.

[10] Healey *v.* Mayor of Batley, L. R. 19 Eq. 375, 44 L. J. Ch. 642.

[11] Reg. *v.* Hutchins, L. R. 5 Q. B. D. 353.

by acts of the owner, when such acts clearly show an intention to donate the way to the public.[1] Unlike a grant gained by prescription, or uninterrupted use of it for a given length of time, it may be presumed from a single act, and takes place immediately whenever there is manifested a clear intention to dedicate.[2] Thus, where a land proprietor builds houses, or makes other improvements upon his land, in such a manner as to form a new street, and this street is used by the public as a highway, the intention to dedicate is immediately implied.[3] So, where a man builds a double row of houses facing upon a way in common, and opening on an ancient street, the way so formed becomes instantly a highway.[4] So, where the owner of land in a city makes a map or plan of his land, laying down upon it certain streets and alley-ways between the lots, and sells the lots according to the plan, dedication will be implied, though no part of the streets thus formed have been adopted by the public authorities.[5] It must be understood, however, in such cases, that the mere laying down or platting land into streets and squares — though they be publicly offered for sale thereby — does not imply a dedication of itself;[6] but if the high-

[1] *Ante*, § 215; Washb. on Easements, 139.

[2] Green *v.* Chelsea, 24 Pick. 71; Child *v.* Chappell, 5 Seld. 256; R. *v.* Patrie, 30 Eng. L. & Eq. 207.

[3] Lade *v.* Shepherd, 2 Str. 1004; Rex *v.* Lloyd, 1 Campb. 260; Hogue *v.* Albina, 20 Or. 182.

[4] Woodyear *v.* Hadden, 5 Taunt. 125; Trustees of British Museum *v.* Finnis, 5 Car. & P. 460; Jarvis *v.* Deane, 3 Bing. 447; Holdane *v.* Coldspring, 21 N. Y. 475; Macon *v.* Franklin, 12 Ga. 239; Pearsall *v.* Post, 20 Wend. 119.

[5] Bissell *v.* N. Y. Cent. R. R. Co., 23 N. Y. 61; De Witt *v.* Village of Ithaca, 15 Hun, 568.

[6] *In re* Rhinelander, 68 N. Y. 105. Generally a dedication will be presumed if a man forms a street across his lands, and fails to erect a gate, or other bar against public use. Lade *v.* Shepherd, 2 Str. 1004; Rex *v.* Lloyd, 1 Campb. 260.

way be both laid out and accepted, the act of dedication will be completed and rendered irrevocable.[1] So, where the houses are sold,[2] a dedication may almost invariably be presumed from the sale of building-lots described by reference to maps and plans upon which are designated streets and alleys,[3] but user by the public is generally necessary to complete the dedication.[4]

Several of the States have statutory enactments whereby dedication is made a matter of public record by the land-owner acknowledging and recording a plan or map of his land, and expressly vesting the use of certain portions of it as streets in the municipal corporation for the use of the public. Such grants may be made though the town at the time of making the same has no corporate existence.[5] These statutes do not prevent dedication from being implied as at common law,[6] and a compliance with their requirements

[1] Mercer *v.* Pittsburg etc. R. R. Co., 36 Pa. St. 99; Abbott *v.* Mills, 3 Vt. 521; State *v.* Trask, 6 Vt. 355.

[2] Hobbs *v.* Lowell, 19 Pick. 405; Woodyear *v.* Hadden, 5 Taunt. 125; Matter of 32d St. New York, 19 Wend. 128.

[3] Irwin *v.* Dixon, 9 How. 10; Wyman *v.* Mayor of N. Y., 11 Wend. 486; Matter of 32d St. *supra;* Hannibal *v.* Draper, 15 Mass. 639; Smith *v.* Fiora, 64 Ill. 92.

[4] Niagara Suspension Bridge *v.* Buchanan, 66 N. Y. 261; Field *v.* Manchester, 32 Mich. 279; Bartlett *v.* Bangor, 67 Me. 460; Fox *v.* Union Sugar Refinery Co., 109 Mass. 292. (That mere survey without use is not a dedication, see U. S. *v.* Chicago, 7 How. 198; Bailey *v.* Copeland, Wright, 150.) For cases where the question of dedication was determined upon the facts of each case, see Missouri Pacific R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. R. 857; Speir *v.* New Utrecht, 2 N. Y. Suppl. 426; Rube *v.* Sullivan, 23 Neb. 779, 37 N. W. R. 666; Skjeggerud *v.* R. Co., 38 Minn. 56, 35 N. W. R. 572; Union Co. *v.* Peckham (R. I.), 12 Atl. R. 130; Chicago *v.* Hill, 124 Ill. 646, 17 N. E. R. 46; State *v.* Adkins, 42 Kan. 203, 21 Pac. R. 1069; Campbell *v.* Karr, 26 Ill. App. 305.

[5] Canal Trustees *v.* Havens, 11 Ill. 554; Waugh *v.* Leech, 28 Ill. 488.

[6] Manly *et al. v.* Gibson, 13 Ill. 308; Fulton *v.* Mehrenfeld, 8 Ohio, 358.

is only evidence of a dedication which may be rebutted.[1]

It is not necessary for a street to be completed before it is dedicated. It may become a public highway though a considerable portion of it be not ready for use.[2]

The extent of land dedicated to the public as a highway is determined by the terms of the grant, or, if by implication, from the user. Thus, where for fifty years owners along the line of a certain street have acquiesced in a certain width, they cannot detract from it, nor make it conform to an original survey.[3] So where a party built a street fifteen feet wide and allowed it to become a thoroughfare.[4] So, where a road was widened from forty to sixty feet, silent acquiescence is not sufficient of itself to imply dedication,[5] though it may, however, after twenty years, give the right of way, as by prescription.[6]

§ 218. Rebutting Presumptions of Dedication. It frequently happens that a land-owner, in the improvement of his land, desires to construct roads across it, or to build houses in rows facing upon a way in common, yet does not deem it advantageous that the ways thus formed shall become public property. In other words, he finds it to his advantage to rebut all presumptions of dedication in order that he may reserve the absolute right to control the land of the ways thus formed.

To give notice that he has no intention to dedicate

[1] People *v.* Beaubieu, 2 Dougl. 258; Hoole *v.* Atty. Gen., 22 Ala. 190.

[2] Barclay *v.* Howell's Lessee, 6 Peters, 498.

[3] Smith *v.* State, 3 Zabr. 130; Maxwell *v.* East River Bank, 3 Bosw. 124.

[4] Gamble *v.* St. Louis, 12 Mo. 617.

[5] Cyr *v.* Madore, 73 Me. 53; Trustees British Museum *v.* Finnis, 5 Carr. & Payne, 460; Chicago *v.* Johnson, 98 Ill. 618. See § 216, *ante*.

[6] Trustees British Museum *v.* Finnis, *supra*; Chicago *v.* Thompson, 9 Ill. 524; State *v.* Trask, 6 Vt. 355.

the use thereof, he can place a gate or bar at its entrance, or post conspicuously a written or printed notice, "No thoroughfare." It is well settled that such acts *may* prevent it from becoming a public highway,[1] though the gate or bars open and shut at pleasure.[2] Yet a person passing over a way apparently open to the public will not generally be deemed a trespasser.[3] Nor is this method of rebuttal always conclusive.[4] Thus, where bars were placed over a private way to prevent the entrance of carriages, but were soon knocked down, and the land-owner suffered them to remain down, it was held that the way was dedicated;[5] so where a gate was left down for twelve years;[6] but not where gates were removed for the making of repairs upon a street, and then restored to their former place, though in the interval the land-owner allowed the public free use of the way,[7] and permitted it to be paved at public expense.[8]

The length of time a roadway must be used in order to raise the presumption of dedication is not material when the clear intention of the land-owner to dedicate his land can be shown. User in such cases, however, is evidence of acceptance on part of the public. The rules applicable to the acquisition of easements by prescription are not applicable to those gained by dedication. Where, however, a clear and unequivocal intention to

[1] Rugby Charity *v.* Merryweather, 11 East, 376, n.; Carpenter *v.* Gwynn, 35 Barb. 395, 406; Proctor *v.* Lewiston, 25 Ill. 153.

[2] Commonwealth *v.* Newbury, 2 Pick. 51; State *v.* Strong, 25 Me. 292; Proctor *v.* Lewiston, *supra.*

[3] Stafford *v.* Coyney, 7 Barn. & Cr. 257; Bowers *v.* Suffolk M'f'g Co., 4 Cush. 332; Cleveland *v.* Cleveland, 12 Wend. 172.

[4] Davies *v.* Stephens, 7 Carr. & Payne, 570.

[5] Roberts *v.* Karr, 1 Campb. 262, n., 1 Taunt. 495.

[6] Lethbridge *v.* Winter, 1 Campb. 263, n.

[7] Carpenter *v.* Gwynn, 35 Barb. 395, 406.

[8] Denning *v.* Roome, 6 Wend. 651.

dedicate cannot be shown, there must be user for the prescriptive period of twenty years.[1] In Iowa, public use for more than ten years makes a road a public highway;[2] in Pennsylvania, public user for twenty-one years is required.[3] But where the intention to dedicate is manifest, no particular period is necessary; indeed, the act of dedication, if accepted, may take instantaneous effect.[4]

When the intent to dedicate is clear, as where a land-owner builds a street,[5] or erects rows of houses fronting upon opposite sides of an open way,[6] length of time is immaterial;[7] otherwise a period of twenty years' uninterrupted enjoyment may have to be shown.[8]

§ 219. Public Authorities. The power to pass laws and regulations concerning highways is vested in the legislatures of the various States. Municipal authorities have no such power unless expressly conferred upon them by statute.[9] The authority, however, is frequently delegated to them, and ordinarily town or city councils, through their officials, may grant permits for

[1] Hoole *v.* Atty. Gen., 22 Ala. 190; Noyes *v.* Ward, 19 Conn. 250; Epler *v.* Numan, 5 Ind. 459; Lewiston *v.* Proctor, 27 Ill. 414.

[2] State *v.* Green, 41 Iowa, 693.

[3] Commonwealth *v.* Cole, 26 Pa. 187.

[4] Woodyear *v.* Hadden, 5 Taunt. 125; Missouri Institute etc. *v.* How, 27 Mo. 211.

[5] Lade *v.* Shephard, 2 Stra. 1004; Miles *v.* Rose, 5 Taunt. 705; Connehan *v.* Ford, 9 Wis. 240.

[6] Woodyear *v.* Hadden, 5 Taunt. 125.

[7] Cemetery Association *v.* Merringer, 14 Kan. 312; Hading *v.* Town of Hale, 61 Ill. 192.

[8] 3 Kent Com. p. 451; Post *v.* Pearsall, 22 Wend. 450; Rex *v.* Lloyd, 1 Campb. 260. For an article on various questions connected with the dedication of public ways, see a note in 32 Am. & Eng. Corp. Cases, pp. 54–64.

[9] Stetson *v.* Faxon, 19 Pick. 147; Commonwealth *v.* Rush, 14 Pa. St. 186.

any reasonable temporary obstructions for building and other purposes;[1] or for doorways, steps, porticos, and the like projecting into the street; or for gates, doors, and shutters swinging outward;[2] or for digging trenches for gas-pipes;[3] or for piling lumber or logs,[4] lime, gravel, and other building materials, in heaps.[5] The introduction of water-pipes, telegraph poles, sewers, drains, and gas-mains may be controlled by the cities.[6] Indeed, the legislature may delegate its entire authority to municipal corporations, giving the latter the right to allow all sorts of obstructions, and even entirely discontinue a highway for the purpose of regrading.[7] So, also, the duty of keeping roads, drains, bridges, sewers, and the like in order is frequently regulated by statute, and often devolves upon the municipal authorities.

§ 220. Extent of Easement of Way. Where a right of way has been acquired by express grant, the natural construction of the grant defines and determines its extent.[8] If it has been granted for a particular use or purpose, it is restricted to that purpose, and any essential change in it extinguishes it.[9] Such easements gained by prescription are determined in their charac-

[1] Woods *v.* Mears, 12 Ind. 515; People *v.* Cunningham, 1 Denio, 524; O'Linda *v.* Lothrop, 21 Pick. 592.

[2] O'Linda *v.* Lothrop, *supra*.

[3] Reg. *v.* Sheffield Gas Co., 22 Eng. Law & Eq. 518.

[4] Mould *v.* Williams, 5 Ad. & El. 469, 1 Hawk. P. C. 76, §§ 48, 50.

[5] Bush *v.* Steinman, 1 B. & P. 404; Burgess *v.* Gray, 1 Man., Gr. & Scott, 578.

[6] Chapman *v.* Albany & S. R. R. Co., 10 Barb. 360; Blant *v.* L. I. R. R. Co., 10 Barb. 26; Boston *v.* Richardson, 13 Allen, 146; West *v.* Bancroft, 32 Vt. 367.

[7] Cases cited in note 6. Such power was conferred on the city of New York by special statute.

[8] Washb. on Easements, 168; Cannon *v.* Villars, L. R. 8 Ch. D. 415.

[9] Allan *v.* Gomme, 11 Adolph. & E. 759.

ter and extent by user;[1] they are *stricti juris;* so that, if it is impossible to determine exactly at what period or to what extent user applies, no easement is gained.[2] Of what a "reasonable use" of an easement consists is often a question for the jury;[3] but generally an easement may be used in any manner whatsoever, so long as such user does not inflict greater injury to the servient estate. Where the use of an alley is conveyed by express grant, as, for instance, in a ninety-nine-year lease, it will be upheld to its full extent;[4] but nothing passes, as an incident to such a grant, but that which is necessary for its reasonable and proper enjoyment.[5]

§ 221. Repairing Ways. We have already seen[6] that liability for repairs to public highways is dependent upon and determined by statute, or by authority vested in municipal corporations. With a private way, the law generally exacts that the owner thereof shall keep it in repair. While he cannot call upon the owner of the servient tenement to make such repairs unless a covenant exists to that effect between them, he can go upon that part of the land, when necessary for him to do so, to make proper repairs.[7] He cannot, however, go outside of the limits of his way to make repairs.[8] So it has been held that the grant of a parcel of land bounding upon a private way gives the

[1] Ballard *v.* Dyson, 1 Taunt. 279; Bower *v.* Hill, 2 Bing. N. C. 339.

[2] Goldsmid *v.* Tunbridge etc., L. R. 1 Ch. 349.

[3] Hawkins *v.* Carbines, 27 L. J. Ex. 44; Skull *v.* Glenister, 16 C. B. N. S. 81.

[4] Bump *v.* Sanner, 37 Md. 621.

[5] Baker *v.* Frick, 45 Md. 337.

[6] *Ante*, §§ 216, 219.

[7] Com. Dig. Chimin D. 6; Pomfret *v.* Ricroft, 1 Saund. 322; Williams *v.* Safford, 7 Barb. 309; Doane *v.* Badger, 12 Mass. 65, 70; Rider *v.* Smith, 3 T. R. 766.

[8] Taylor *v.* Whitehead, 2 Dougl. 745; Williams *v.* Safford, 7 Barb. 309.

grantee the right of way over the way, but not a right to carry away the materials thereof, although he could use the sand, gravel, stone, etc., within the passage-way, for the purpose of grading, filling, and repairing it.[1]

§ 222. OBSTRUCTING HIGHWAYS. A highway is a public thoroughfare or roadway, and must be kept free and open for all persons. Any obstruction, whether by failure of duty by those charged to keep it in repair, or by actual obstruction, is an offence against the public. While any act which unnecessarily incommodes the public, or impedes the lawful use of a highway, is a nuisance and may be indictable,[2] yet such an act is not *actionable* unless an individual has suffered some special damage beyond what is common to the rest of the public.[3]

The entire length and breadth of a public way must be kept free and open. But it seems that the temporary use of a portion of a street or other highway for building purposes, when actually necessary, is permissible, so long as the encroachment is not unreasonably continued.[4] Though building is a necessity, it is the duty of those engaged therein to use due care that the public is not unduly inconvenienced.

Clearly, then, not every obstruction of a highway amounts to a nuisance.[5] Putting up a fence or barrier

[1] Phillips *v.* Bowers, 7 Gray, 21. So, where a land-owner enjoys the right of carrying water by means of pipes over his neighbor's land, the right carries with it the privilege of going upon the land to make necessary repairs. Bell *v.* Twentyman, 1 Q. B. 766; Alston *v.* Grant, 3 El. & Bl. 128.

[2] Angell on Highways, 3d ed. § 222.

[3] Ibid.

[4] People *v.* Cunningham, 1 Denio, 524.

[5] Wood on Highways, 2d ed. § 81; Atty. Gen. *v.* Parmenter, 10 Price, 378; Regina *v.* Rand, 1 Car. & M. 496; Chapin *v.* Brown (R. I.), 10 Atl. R. 639.

across a way does not, as a matter of law, constitute an interruption of the use of the way, in the absence of further evidence of the circumstances.[1] In rebuilding or repairing a house, the public must bear the inconvenience necessarily connected therewith, and only when the inconvenience is unreasonably great, or continued unnecessarily, can the offending party be indicted for nuisance.[2] But it is no obstruction of a private way to build over it in such a way as does not interfere with the legitimate right of passage.[3] For instance, where a right of way was reserved over a carriage-way to a stable, the owner of the servient tenement was allowed to erect a building over the way, leaving an arched passage sufficient for the purposes reserved.[4] The same principle has been applied to structures jutting out into the space over a highway, such as balconies and windows. The building of a bay window or balcony beyond the building line over the street, interfering with the lateral view of others, but not obstructing passage in the street, is not a nuisance.[5]

But where a land proprietor employed a builder who constructed a shed so far out into the street as to permanently encroach thereupon, the owner was held

[1] Weld *v.* Brooks, 152 Mass. 297, 25 N. E. R. 719. So, also, where the owner of land put gates, conveniently arranged, at the ends of a private way, to keep out those not entitled to pass, one having an easement was not justified in demanding their removal. Whaley *v.* Jarrett, 69 Wis. 613, 34 N. W. R. 727.

[2] Commonwealth *v.* Passmore, 1 S. & R. 219; St. John *v.* Mayor of N. Y., 6 Duer, 314.

[3] Harrison *v.* Pike, 4 Bull. 156 (Ohio Super. Ct. 1879); Harrison *v.* Craighead, 5 Bull. 270.

[4] Grafton *v.* Moir, 130 N. Y. 465, 29 N. E. R. 974. See, also, Hollins *v.* Demorest, 129 N. Y. 676, 29 N. E. R. 1093; Patterson *v.* R. Co., 8 Pa. Co. Ct. R. 186.

[5] Gray *v.* Baynard, 5 Del. Ch. 499. See Hay *v.* Weber, 79 Wis. 587, 48 N. W. R. 859; Ocean Pier Co. *v.* Woolsey, 4 N. Y. Suppl. 114.

guilty of a nuisance.[1] In short, any permanent encroachment upon a street is a nuisance.[2]

It is clearly established that one has no right to construct a building with a roof overhanging the sidewalk,[3] or to leave cellar openings not guarded,[4] or to make excavations so near the highway as to endanger passers-by,[5] or to erect stair-steps, bay windows, or any projection liable to inconvenience or endanger the public.[6] While excavations or other dangerous operations[7] near highways are indictable as nuisances, the same may be permitted if proper authority be obtained, and danger

[1] Bush *v.* Steinman, 1 B. & P. 407.

[2] Smith *v.* State, 23 N. J. L. 712; Atty. Gen. *v.* Heishon, 18 N. J. Eq. 410. Building a house higher than it was before, whereby the street becomes darker, is not a nuisance on account of the darkness only. Rex *v.* Webb, 1 Ld. Raym. 737. See § 174, *ante*.

[3] Garland *v.* Towne, 55 N. H. 56. The question, as to what is an unreasonable use of a highway for building purposes, is considered at length in Fritz *v.* Hobson, 42 L. T. (N. S.) 225. See, also, Wood on Nuisances, § 256.

[4] Coupland *v.* Hardingham, 3 Campb. 398; Irvine *v.* Wood, 31 N. Y. 224.

[5] Clark *v.* Fry, 8 Ohio St. 359. In these cases the offence is also actionable. In Rivera *v.* Finn, 3 N. Y. Suppl. 22, an excavation under an alley over which a right of way existed was held not to amount to an obstruction.

[6] Commonwealth *v.* Blaisdell, 107 Mass. 234; Reg. *v.* Burt, 11 Cox C. C. 399; Stephani *v.* Brown, 40 Ill. 428; House *v.* Metcalf, 21 Conn. 631; Beatty *v.* Gilmore, 16 Pa. St. 463; Portland *v.* Richardson, 54 Me. 46. Placing across a thirty-three-foot way a fence with a gate ten feet wide is an unlawful obstruction. Patton *v.* Educational Co., 101 N. C. 408, 8 S. E. R. 140. In Ocean Pier Co. *v.* Woolsey, 4 N. Y. Suppl. 114, the placing of booths, posts, and fences extending four or five feet into a thirty-foot way was held an obstruction, but not the maintenance of an overhanging balcony. Further examples of unlawful obstruction will be found in Jackson *v.* Kiel, 13 Colo. 378, 22 Pac. R. 504 (blocking with railroad cars the intersection of streets adjacent to the premises, so as to obstruct the approach and affect the rental value); Ellis *v.* Academy of Music, 120 Pa. 608, 15 Atl. R. 494 (gate and shed maintained on an alley); Thompson *v.* Pa. R. Co., 45 N. J. Eq. 870, 14 Atl. R. 897 (using as a terminal a space over which a right of way only existed); Gibson *v.* Black (Ky.), 9 S. W. R. 379 (erecting scales on a highway so as to interfere with its use).

[7] Reg. *v.* Nutter, 34 L. J. M. C. 22.

signals and all other proper guards be taken for protection of the public.[1] Property bounding on a highway must not be allowed to become in a dangerous condition. Thus, a house in danger of falling down is a nuisance, and must be removed.[2] What would otherwise be deemed a nuisance may sometimes be avoided by taking all reasonable precautions; thus, in an English case,[3] a board was used for protecting the public from inevitable danger, but still left them a free passage by another way: though it necessarily obstructed the whole street, it was not a nuisance.

§ 223. REMEDIES. If the owner of a servient tenement obstructs the enjoyment of a right of way over his land, the owner of the dominant tenement may bring an action at law against him for damages, or may even enter upon his land and abate the nuisance.[4] Generally, any obstruction placed upon a way, whether a gate, bar, or (it has sometimes been held) a house,[5] may be removed by the injured party, and this, too, though he enter for the purpose upon adjoining land of the party erecting or continuing it,[6] provided he does no more damage than is necessary.[7] So, if the owner of a right of way encroaches upon the servient estate

[1] Proctor *v.* Harris, 4 C. & P. 337; Stevens *v.* Stevens, 11 Met. (Mass.) 251; McCamus *v.* Citizens' Gas-Light Co., 40 Barb. 380.

[2] Reg. *v.* Watts, 6 Salk. 357.

[3] Rex *v.* Ward, 4 Ad. & El. 405.

[4] 2 Roll. Abr. Nuisance, 81; Wigford *v.* Gill, Cro. Eliz. 269; Perry *v.* Fitzhowe, 8 Q. B. 757. Under the N. Y. Code of Civ. Proc. (§ 449), the lessee of the dominant tenement, being a real party in interest, may sue. Avery *v.* R. Co., 7 N. Y. Suppl. 341.

[5] A person having a right of way, which has been obstructed by the erection of a house, may, after notice to remove, pull it down, though it is at the time inhabited. Lane *v.* Capsey, 1891, 3 Ch. 411.

[6] James *v.* Hayward, Cro. Car. 184; Arundel *v.* McCulloch, 10 Mass. 70; Moffett *v.* Brewer, 1 Iowa, 348.

[7] Bro. Abr. Nuisance, 105 b, pl. 33.

by doing acts which inflict a greater burden upon the latter, the proprietor of the servient estate may obstruct the excessive user of the way,[1] provided he does not interfere with the proper enjoyment thereof.[2]

But he may not convert the obstructing material to his own use,[3] nor remove it if the removal involves a breach of the peace;[4] nor can he do so by means which encroach upon or obstruct its lawful use. An obstruction is not considered such a nuisance as will justify abatement unless it actually encroaches upon the travelled part of a highway.[5]

Courts of equity will generally grant mandatory injunctions to prevent improper obstructions to a private way.[6] The remedy, however, will not be extended to cases where an individual seeks to sustain his right to enjoy a public easement when the injury of which he complains affects the whole community.[7] Whether the injunction will be granted at all is within the sound discretion of the court.[8] For example, in *McBryde* v. *Sayre*[9] it was held, where a right of access through one

[1] Greenslade *v.* Halliday, 6 Bing. 379, 8 L. J. C. P. 124.

[2] Ibid.

[3] 1 Hawk. P. C. ch. 76, § 187.

[4] Day *v.* Day, 4 Md. 262.

[5] Hopkins *v.* Crombie, 4 N. H. 520. In this case the frame and cellar of a building extended about ten feet into the highway, but did not cover or obstruct any part of the travelled way thereof: the court held that it could not be abated by any individual whose passage was not actually obstructed. Harrower *v.* Ritson, 37 Barb. 301.

[6] 2 Story Eq. Juris. Red. ed. § 927; Stevens *v.* Stevens, 11 Metc. 251; Russell *v.* Napier, 80 Ga. 77, 4 S. E. R. 857 (where the obstruction was only a gate which plaintiff might have opened himself); Stallard *v.* Cushing, 76 Cal. 472, 18 Pac. R. 427.

[7] Hartshorn *v.* South Reading, 3 Allen, 501; Brainard *v.* Connecticut River R. R. 7 Cush. 506.

[8] Williams *v.* Jersey, 1 Craig & P. 91; Short *v.* Taylor & Anonymous, 2 Eq. Cas. Abr. 522.

[9] 86 Ala. 458, 5 So. R. 791.

building to another had become extraordinarily burdensome by a change of use in the dominant tenement, that under all the circumstances the complainants would be left to their remedy at law. A distinction must be taken according as the nuisance is a series of acts not necessarily connected with the building used, or a series of acts of which the erection of a special building is a necessary part. In the former case an injunction would usually not issue against the mere erection of the building.[1]

[1] Appeal of Czarinecki (Pa.), 11 Atl. R. 660; Bowen v. Mauzy, 117 Ind. 258, 19 N. E. R. 526; Depierris v. Mattern, 10 N. Y. Suppl. 626.

CHAPTER XXVI.

DRAINS, SEWERS, CESSPOOLS, AND PERCOLATIONS.

§ 224. WHY THIS CHAPTER. The subject of Drains, Sewers, Cesspools, and Percolations is one of so much importance in building operations that it has been deemed advisable to supplement the cursory remarks contained in the chapter on Building Nuisances.[1]

The writer will not here restrict the treatment of the subject under consideration to the law of easements relating thereto, but will briefly sketch the law pertaining to these matters, though in so doing he trespasses upon Nuisances, Negligence, Torts, and Easements generally.

§ 225. SEWERAGE AND DRAINAGE. It has been said that all filth and other matters giving off noisome odors are dangerous to human health if suffered to remain near our habitations; and for this reason it is the duty of all persons to remove all filth caused by them, as speedily and as effectively as possible. Systems of sewerage and drainage are undergoing radical changes in this country. In nearly all our cities boards of health have been established, and upon their recommendations privy-pits and cesspools are fast disappearing. But a few years since, privies were attached to houses of every description, whether located in the country, in towns, or in cities; and to this day, in many of our Southern cities, no regular systems of sewerage have been adopted. Excrement and other filth is

[1] *Ante*, Ch. XII. §§ 76–85.

allowed to accumulate in large wooden hogsheads, or bricked-up vaults, in close proximity to dwelling-houses. In many instances these dangerous and offensive places are neglected, or so improperly constructed that damages result to neighboring wells, etc. Actions at law are frequently brought, or injunctions sought, to remedy and to prevent the injurious consequences of such places. Not long since, rigid ordinances were enacted to prevent inhabitants from allowing any matter other than rain or surface water to pass into the public drains or sewers; but of late years sanitary regulations have so changed that in many cities there exists a complete underground net-work of sewer-pipes and drains, which carry off both rain-water and filth. Little natural streams flowing through towns have been tunnelled over, and made to become the chief avenues into which the filth passes to be carried on with the water in its natural course. Generally the large drains are made of sufficient size to allow men to pass along their entire length in order to keep them clean, but some towns have adopted a system whereby smaller drains are utilized, and water introduced into them for cleansing purposes by artificial means. Many legal complications may still arise after public systems of sewerage have been adopted, but in nearly all of such the municipal corporation becomes a party, and litigation will not be so frequent as under the old plan.

Municipal corporations can adopt any system of sewerage they deem best, and they are not liable for damages occasioned because of their failure to choose the best system, or because they erred in judging of the necessity of sewers.[1]

[1] Lynch *v.* New York, 76 N. Y. 60; Darling *v.* Bangor, 68 Me. 108; Denver *v.* Capelli, 4 Col. 25. But see Franklin Wharf Co. *v.* Portland, 67

§ 226. CESSPOOLS AND PRIVIES. These terms are generally used synonymously. A cesspool, however, is usually a large underground tank or hogshead, built of wood or brick, into which excrement and all other sewerage of dwelling-houses is discharged. The term "privy" ordinarily means the "necessary house," having only a pit dug in the ground to receive the filth deposited, such as is attached to cottages in country districts. Both are *primâ facie* nuisances.[1] Typhoid, typhus, and innumerable other fevers are apt to be contracted from the poisonous atmosphere of such places, while wells and subterranean streams become surcharged with deadly gases. Yet, unless public systems of sewerage and drainage be adopted, cesspools or privies are necessary, and indispensable in connection with dwelling-houses. It is, nevertheless, the legal duty of him who has filthy matter from a privy or other place upon his premises, to see that it does not annoy or trespass upon the property of his neighbor;[2] and he commits an actionable nuisance if he allows his filth to percolate through the soil of the adjacent premises, injuring his neighbor's cellar, fouling his well, or causing other damage.[3] The law requires the owner of such places not only to take reasonable precautions, but absolutely and effectually to exclude the filth from his neighbor's land; only an inevitable accident can excuse him.[4] These necessary houses[5] may become

Me. 46, where a city was held responsible for filling up a dock with sewerage matter.

[1] Wood on Nuisances, 665; Jones *v.* Powell, Hutt. 135.

[2] Tenant *v.* Goldwin, 1 Salk. 360, 6 Mod. 311.

[3] Ibid. See, also, Ball *v.* Nye, 99 Mass. 582; St. Helen's Chemical Co. *v.* St. Helen's, L. R. 1 Exch. Div. 196; Greene *v.* Nunnemacher, 36 Wis. 50; Pottstown Gas Co. *v.* Murphy, 39 Pa. St. 257.

[4] Ball *v.* Nye, 99 Mass. 582; Hodgkinson *v.* Ennor, 4 Best. & S. 229.

[5] Webster's Dictionary.

nuisances if from them offensive odors arise, destroying a neighbor's comfortable enjoyment of his premises;[1] or if they are built in such a manner as to annoy other tenants[2] (for "he who erects a building which is liable to become a nuisance, except great care is exercised, is liable for the consequences occasioned thereby"[3]); or if filthy matter escapes,[4] corrupting water of a well or fouling a stream.[5]

Indeed, it may be laid down as a general rule that the owner of a cesspool or privy-pit is bound to keep the filth collected in it upon his own premises, and prevent it from becoming a nuisance.[6] So, where a land-owner had a well sunk upon his premises sixty feet deep, and his neighbor constructed a cesspool at a distance of fourteen yards from the well, and dug the cesspool to a depth of forty-seven feet, or within thirteen feet from the level of the well, and it was found shortly afterwards that the water contained in the latter was affected thereby to such an extent as to become unfit for family use, the court granted an injunction restraining the owner of the cesspool and all other persons from using it.[7]

The rule is substantially the same as that laid down

[1] Barnes *v.* Hathorn, 54 Me. 124; Wahle *v.* Rembach, 76 Ill. 322.

[2] Jones *v.* Powell, Hutt. 135; Tenant *v.* Goldwin, 2 Ld. Raym. 1089.

[3] Rex *v.* Pedley, 1 Ad. & E. 822.

[4] Tenant *v.* Goldwin, *supra.*

[5] Norton *v.* Schofield, 9 M. & W. 665; Wormesley *v.* Church, 17 L. T. (N. S.) 190.

[6] Marshall *v.* Cohen, 44 Ga. 489; Mackey *v.* Greenhill, 30 Jur. 746. But where the different floors of a building were let to several tenants, and there was a water-closet on the second floor, it was held that the landlord was not liable for injuries sustained by the lower tenant by reason of the water-closet being neglected by his other tenants. Robbins *v.* Mount, 4 Robertson (N. Y. Sup. Ct.), 553.

[7] Wormesley *v.* Church, 17 L. T. (N. S.) 190. See, also, Ottawa Gas Co. *v.* Thompson, 39 Ill. 601; Brown *v.* Illinois, 25 Conn. 583.

in *Fletcher* v. *Rylands*,[1] that when a man brings upon his land water, or anything else which is apt to injure his neighbor, he is bound to use the greatest amount of care and diligence that it does not become a nuisance.[2]

§ 227. JOINT PRIVIES. In many towns and cities, privies are constructed partly upon the land of each of two adjoining houses, and used in common by the tenants of both buildings. Many of the doctrines and principles of law concerning party walls and fences are applicable to litigation arising in such cases, particularly as to repairs and the cleaning out of the accumulating filth.

§ 228. DRAINS AS EASEMENTS. The right of drainage over the land of another may be acquired by express grant or by prescription, like other easements,[3] and such a right, like those of ways, water-ways, light and air, are continuous and apparent easements passing by implication with a grant of the land.[4] Thus, the right passes to the assignee of a dominant owner when, whether by grant or prescription, the latter has acquired the easement of running water, by means of pipes or trenches, over the lands of his neighbor;[5] so, when drains or sewers, from the very nature of their construction, bear evidence that their builders intended that they should remain after the severance of the

[1] Fletcher *v.* Rylands, 1 Exch. 265, L. R. 3 H. L. 330, 37 L. J. Ex. 101. See *ante*, § 199.

[2] Cahill *v.* Eastman, 18 Minn. 324; Tenant *v.* Goldwin, 6 Mod. 311, 2 Ld. Raym. 1089.

[3] Kent Com.

[4] De Luze *v.* Bradbury, 25 N. J. Eq. 70; Havens *v.* Klein, 55 How. Pr. 82; Simmons *v.* Cloonan, 81 N. Y. 557; Cave *v.* Craft, 53 Cal. 136.

[5] Washb. on Easements (4th ed.), 50; Hill *v.* Miller, 3 Paige, 254; Pyer *v.* Carter, 1 Hurl. & Nor. 916.

property, the necessity of the easement may be established;[1] so where a party purchased two lots of land adjoining each other, one having an artificial drain over the other, connecting it with a distant canal, although, while both belonged to the same person, the easement was merged, it was held to be revived upon his selling the lots separately to different purchasers.[2] The *private* right of drain, it seems, once gained, is not lost by the construction of a public drain through the lands, though thereby the private drain ceases to be necessary;[3] but if, in gaining an easement of drain, the use thereof be materially changed, the period of prescription runs from the time the change was made;[4] nor can a drain granted for a particular purpose be used for any other purpose.[5]

§ 229. The Construction and Repairing of Drains. Ordinarily a man cannot be compelled to drain his land so long as it remains in its natural state.[6] He can allow the floods to wash it away, rank weeds to grow upon it, or ponds and malarious marshes[7] to form.

[1] Worthington *v.* Gimson, 29 L. J. Q. B. 116, 2 El. & El. 618; Kelly *v.* Dunning, 43 N. J. Eq. 62, 10 Atl. R. 276; Hair *v.* Downing, 96 N. C. 172, 2 S. E. R. 520; Hamell *v.* Griffiths, 49 How. Pr. 305. So a grantee of the servient tenement, "as the same is now inclosed, built, and occupied," takes subject to a right of drainage through the land granted, by drain-pipes then laid in the soil. Flint *v.* Bacon, 13 Hun, 454.

[2] Ferguson *v.* Witsell, 5 Rich. 28; Shaw *v.* Ethridge, 3 Jones (Law), 300. Where a sewer ran from a house and discharged in the cellar of a barn, and the house was subsequently set aside as dower and homestead, it was held that the assignee in dower had no easement to empty the sewer on the adjacent land unless it was necessary to do so. Smith *v.* Blanpied, 62 N. H. 652.

[3] Hastings *v.* Livermore, 7 Gray, 194.

[4] Cotton *v.* Pocasset M'f'g Co., 13 Met. 429; Steen *v.* Burder, 24 Ala. 130.

[5] Carter *v.* Page, 8 Ired. 190.

[6] Hartwell *v.* Armstrong, 19 Barb. 166; Woodruff *v.* Fisher, 17 Barb. 224.

[7] Hartwell *v.* Armstrong, *supra*.

No matter how great an annoyance it becomes to his neighbors, or how unhealthy it may be,[1] he is not bound to drain it. But from the moment he builds or makes excavations upon it his legal liability is entirely changed. While he still retains the right to lay drain-pipes or dig trenches upon his land, and carry the water from his premises, he must observe due care. He cannot allow the water to collect after building or excavating: he *must* provide good and *sufficient* drains. If he still allows water to accumulate, or become stagnant, or to percolate, upon the land of his neighbor, he is bound to abate the nuisance, and is also liable for damages.[2]

One neighbor cannot force another to remedy defects in the latter's land, so long as it remains in its *natural* state: he must guard against these himself, but as soon as a land-owner undertakes to change the natural surface of the land, he renders himself liable to see that it is properly and efficiently drained.

Drains put upon property must not only be of good and sufficient *capacity* to discharge all the water with which they are likely to be surcharged, but they must be kept clean and repaired by him who owns them.[3] The principle of law is that, where water is brought upon land, or artificial drains made to regulate its course, though it accumulates from rain-falls, every reasonable precaution must be taken to prevent it from causing injury to others.[4] Where, however, a sewer or drain has been properly built by competent workmen, and all usual or reasonable methods employed to efficiently carry off the natural fall, the

[1] Woodruff *v.* Fisher, 17 Barb. 224.
[2] Baird *v.* Williamson, 33 L. J. C. P. 101.
[3] Rockwood *v.* Wilson, 11 Cush. (Mass.) 221.
[4] Chicago & N. W. R. R. *v.* Hoag, 90 Ill. 339.

owner of the house cannot be held responsible for damages caused by unforeseen circumstances.[1]

If a man owns two houses, through one of which a drain passes which is defective, or so much out of repair as to be a nuisance, and while it is in this condition he leases the house through which the drain passes, he will be liable for damages if he suffers the drain to remain out of repair, though it does not become in a worse condition than when the house was leased.[2]

§ 230. SEWERS. The remarks contained in the preceding section are generally applicable to sewers, the terms "sewer" and "drain" being ordinarily used synonymously. Callis calls a sewer "a fresh-water trench compassed in on both sides with a bank, and is a small current or little river," — in other words, "a common public stream."[3] These definitions are hardly accurate, since sewers of modern times are usually far from being "fresh-water trenches." We therefore shall call it a drain, pipe, trench, or other passage (usually under ground) artificially constructed, for the purpose of carrying off water and filth. Beneath many of the large cities of the present day there exists a complete net-work of these subterranean canals, especially adapted for carrying off both water and filth.[4]

Sewers are ordinarily under the control of the sanitary authorities, usually municipal officials. Such being the case, individual citizens would have no right of action against the authorities for allowing persons to use sewers wrongfully. Possibly the authorities themselves could obtain an injunction to restrain the

[1] Kohlhammer *v.* Weisbach, 90 Ill. 311.
[2] Alston *v.* Grant, 3 Ellis & B. 128.
[3] Callis on Sewers, 57–59.
[4] *Ante*, § 225.

wrongful use, and generally they are empowered by law to prevent such offences; but they are not responsible as private individuals, for they are at the most but agents or servants of the corporation.[1]

To render indictable the act of fouling a stream by constructing sewers so that their contents cause the injury complained of, there must be an actual invasion of the right to have the stream free from pollution.[2]

§ 231. LIABILITY OF MUNICIPAL CORPORATIONS. In some cases the act creating the corporation imposes upon it the duty of keeping sewers and drains in proper condition. Where such a duty is imposed, and there is clearly a breach of it, the corporation is liable for any and all damage thereby occasioned.[3] So, where an injury is caused by the corporation, whether by failing to perform a positive duty or by performing it in a negligent or wrongful manner, an action for negligence against it may be sustained.[4] Neither a corporation nor an individual is liable for doing that which is authorized by the legislature, provided the authority is not exceeded; and even if there is an omission to perform a certain duty imposed by law, but no negligence is shown in the omission, there is no liability established.[5]

[1] Atty. Gen. *v.* Guardians of Dorking, L. R. 20 Ch. D. 595; Charles *v.* Finchley Local Board, L. R. 23 Ch. D. 767.

[2] See Lillywhite *v.* Trummer, 16 L. T. N. S. 318 (held not sufficient).

[3] Hammond *v.* Vestry of St. Pancras, L. R. 9 C. P. 316, 43 L. J. C. P. 157.

[4] Ibid. In this case a sewer was overflowed. In Broughton *v.* Midland Grand Ry. of Ireland, 7 Ir. R. C. L. 169, water was turned into a stopped-up sewer. North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. R. 821; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. R. 686. The fact that a ditch dug by a corporation was made on the land of a third person by his consent does not relieve from liability for the shedding of water on private premises. Weir *v.* Plymouth (Pa.), 24 Atl. R. 94.

[5] Hammond *v.* Vestry of St. Pancras, *supra*.

But where a corporation negligently omits to perform a duty, or performs it in such a manner that unnecessary damage is occasioned, or there is a failure upon its part to exercise more than ordinary care,[1] or it knowingly permits the duty to be performed improperly, it is clearly liable.[2] Thus, where a city has an ordinance requiring all private drains to be made to empty into a main sewer, the corporation must keep the sewer open;[3] but where there is no such ordinance the corporation will not be liable.[4] The point of distinction is that corporations, having power conferred upon them to construct and repair sewers, are liable for any damages which may result from defective construction,[5] if they have failed to use due diligence in taking every reasonable precaution;[6] while they are not liable if they have strictly followed and not exceeded the authority vested in them. So a city is held liable for damage occasioned by building a sewer in such a manner that its contents are discharged on the property of an individual,[7] in a canal,[8] or in a previously unpolluted stream.[9] In general, a municipal sewer so negligently constructed that it causes water and other sewage to flow into private premises is a

[1] Campbell on Negligence, 18; Smith on Negligence, 151.

[2] Geddis *v.* Bann Reservoir, L. R. 4 App. Cas. 430; Parnaby *v.* Lancaster Canal Co., 10 Ad. & El. 223 (canal company, operating under statute). See, also, Sumner *v.* St. Paul, 23 Minn. 408.

[3] Child *v.* Boston, 4 Allen, 41.

[4] Barry *v.* Lowell, 8 Allen, 127.

[5] Barton *v.* Syracuse, 36 N. Y. 54; Montgomery *v.* Gilmer, 33 Ala. 116; Logansport *v.* Wright, 25 Ind. 512.

[6] Fleming *v.* Mayor etc., 44 L. T. Rep. (N. S.) 517.

[7] Jacksonville *v.* Lambert, 62 Ill. 519; Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. R. 300; Rice *v.* Flint, 67 Mich. 401, 34 N. W. R. 719; Pye *v.* Mankato, 36 Minn. 373, 31 N. W. R. 863.

[8] Locks & Canals *v.* Lowell, 7 Gray (Mass.), 223.

[9] Merrifield *v.* Worcester, 110 Mass. 216; Brandt *v.* Albany, 5 Hun (N. Y.), 591.

nuisance, and the city is liable for damages if it is not abated after notice.[1]

Where a sewer was constructed large enough for its original purpose, but damage resulted, in consequence of the increased size of the city, from an extraordinary fall of rain, the corporation was held not to be liable.[2] On the other hand, it has been held that a city is liable for the want of capacity of a culvert erected by it to carry off the water of a natural stream.[3]

"When a corporation has a positive duty to perform, it is no answer to an allegation of negligence upon its part that its officers, servants, or agents were ordered to do it,[4] nor that they have contracted with a competent person for the performance of such duty;[5] but if it goes farther, and shows that the work was done in a competent manner, and that the injury was caused by

[1] Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. R. 339; Buckley *v.* New Bedford (Mass.), 29 N. E. R. 201; Defer *v.* Detroit, 67 Mich. 346, 34 N. W. R. 680; Loughran *v.* Des Moines, 72 Iowa, 382, 34 N. W. R. 172; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. R. 139. See, also, Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. R. 703; Gilluly *v.* Madison, 63 Wis. 518, 24 N. W. R. 137; Levy *v.* Salt Lake City, 3 Utah, 63, 1 Pac. R. 160; for a city's general liability in case of negligent construction of sewers. The municipality, however, is not bound to construct so as to carry off all the surface water that falls. Denver *v.* Rhodes, 9 Colo. 554, 13 Pac. R. 729; Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. R. 322; Allen *v.* Chippewa Falls, 52 Wis. 430, 9 N. W. R. 284.

[2] Corp. *v.* Northern Liberties, 35 Pa. St. 324; Smith *v.* N. Y., 66 N. Y. 295. Damage from an overflow through a storm of unusual violence cannot be the subject of a recovery. Fairlawn Coal Co. *v.* Scranton (Pa.), 23 Atl. R. 1069.

[3] Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Phinzy *v.* Augusta, 47 Ga. 260.

[4] Smith on Negligence, 156, citing Scott *v.* Manchester, 2 H. & N. 204.

[5] Grote *v.* Chester & Holyhead Ry. Co. 2 Ex. 251; Francis *v.* Cockerell, L. R. 5 Q. B. 501, 39 L. J. Q. B. 291. See Phila. Ry. Co. *v.* Anderson, 39 Am. Rep. 787 (defective drainage of embankment washed away by flood).

an accident, or *vis major*, it is excused."[1] So a corporation is liable for damage resulting to private property from the negligent exercise of its authority to construct sewers.[2]

A municipal corporation has no right to use a sewer so as to create a nuisance by emptying drains and cesspools into it to the injury of health and navigation.[3] Nor can it fill up a dock with sand and other refuse,[4] or divert streams, whereby large quantities of dirt, etc., are deposited in the harbor, injuring the depth of the channel.[5]

[1] Grote *v.* Chester & Holyhead Ry. Co., 2 Ex. 251 ; G. W. Ry. of Canada *v.* Fawcett, 1 Moo. P. C. N. S. 101.

[2] Leavenworth *v.* Casey, McCahan (Kans.), 124 ; Indianapolis *v.* Huffer, 30 Ind. 235 ; Roll *v.* Indianapolis, 52 Ind. 547 ; McCarthy *v.* Syracuse, 46 N. Y. 194.

[3] Haskell *v.* New Bedford, 108 Mass. 208 ; Brayton *v.* Fall River, 113 Mass. 218.

[4] Franklin Wharf Co. *v.* Portland, 67 Me. 46 ; Haskell *v.* New Bedford, and Brayton *v.* Fall River, *supra*.

[5] Per Ch. J. Archer, Barron *v.* Baltimore, 2 Am. Jur. 108 (1828).

PART IV.

MECHANIC'S LIENS.

CHAPTER XXVII.

IN GENERAL.

§ 232. NOT A COMMON LAW LIEN. Mechanic's liens are not recognized at common law, but owe their origin entirely to legislative enactments.[1] In Great Britain the lien is unknown, and in this country no lien, arising from a mere building contract, can be enforced even in equity, independent of statutory law.[2]

§ 233. HISTORICAL VIEW. The people of the United States, soon after they gained their independence, found themselves hampered by many inequitable provisions of English statutory law, and the absence of many just and wise provisions consistent with the principles of the new Republic; and the law-makers of the several States early enacted many supplementary laws. The justness of the mechanic's lien upon property which he had helped to create was soon recognized, for in the latter part of the year 1791 the General Assembly of Maryland passed "An Act to encourage master builders by establishing a lien for their just

[1] Sodini *v.* Winter, 32 Md. 130; Canal Co. *v.* Gordon, 6 Wall. 531; Truesch *v.* Shryock, 51 Md. 169; Blake *v.* Pitcher, 46 Md. 464; Davis *et al. v.* Farr *et al.*, 13 Pa. 167; McCoy *v.* Quick, 30 Wis. 521.

[2] Ellison *v.* Jackson Water Co., 12 Cal. 542.

claims" on houses upon which they worked or for which they furnished materials. In 1803 similar laws were enacted in Pennsylvania; the other original States followed, and, as new States were added, the principle of the lien was gradually extended, so that it is now recognized in every State and Territory of the Federal Union. The Canadian Provinces also have adopted the principle of the lien.[1]

§ 234. SIMILARITY OF THE LIEN STATUTES. There is great similarity in the mechanic's lien laws in all the main provisions; yet there is such diversity in that which pertains to the time and place of filing the lien claim to the limitations, to the rights of contractors and sub-contractors, and in innumerable other special restrictions, etc., that it is not considered advisable to enter into a voluminous treatment of this subject, which has been so skilfully handled by Mr. Phillips and, later, by Mr. Jones, in their admirable volumes.

§ 235. DOES NOT BAR THE DEBT. The law, in establishing the lien, does not bar the indebtedness if the claimant fails to file his claim within the statutory period, for the debt survives after the lien dies.[2] The lien is simply a preference given to secure payment of debts incurred in constructing or repairing buildings, and, though its benefits may be waived, an action at law may still be had to recover the value of the claim. It resembles a mortgage or a judgment upon the property, and under many statutes is enforcible by similar process.[3] It attaches only to the real estate, and not to the rents and profits thereof;[4] and if the building

[1] Civil Code Lower Can., Art. 2013; Rev. St. Ont. 1887, c. 126.
[2] Hunter *v.* Lawning, 76 Pa. 25.
[3] Goodman *v.* White, 26 Conn. 317; Ritter *v.* Stevenson, 7 Cal. 388.
[4] Kimball *v.* Sumner, 62 Me. 305.

is destroyed by fire or otherwise, the lien (but not the debt) ceases.[1]

§ 236. NON-RESIDENTS ENTITLED. The United States constitutional provision that "the citizens of each State shall be entitled to the privileges and immunities of the citizens of the United States," guarantees that the benefit of mechanic's lien laws shall extend to non-residents furnishing work or materials in the construction of buildings, etc.[2]

§ 237. EXTENT OF THE LIEN. The lien usually covers not only the building erected, but also the ground upon which it stands, and in many of the States the adjacent ground, if belonging to the owner of the building.[3] If the work or material is furnished to a person or persons other than the owner as lessee or tenant, the lien only extends to the interest of such person. The courts of the various States cannot extend the lien claim beyond positive enactments, though they will construe the statute according to the intent and purpose of the legislators creating it, in cases where a strict construction would inflict great injustice.[4] Yet the letter of the statute is usually followed, for it is the very essence of the law, without which the lien has no existence, and courts have no power to encroach upon legislative enactments.[5]

[1] Coddington *v.* Dry Dock Co., 3 N. J. L. 477 ; Schukraft *v.* Ruck, 6 Daly, 1 ; but, *contra*, see Freeman *v.* Carson, 27 Minn. 516 ; McLaughlin *v.* Green, 48 Miss. 175 ; Steigleman *v.* McBride, 17 Ill. 300.

[2] Greenwood *v.* Tennessee Man. Co., 2 Swan (Tenn.), 130; Ward *v.* Maryland, 12 Wall. 418.

[3] *E. g.* Md. Rev. Code, § 4 *et seq.* in art. 67.

[4] Dame's Appeal, 62 Pa. 417.

[5] Rafter *v.* Sullivan, 13 Abb. Pr. 262 ; *Ex parte* Schmidt, 52 Ala. 256.

CHAPTER XXVIII.

PRIORITIES OF THE LIENS OF MECHANICS.

§ 238. Beginning of the Lien. (*a.*) The statutes usually declare that the lien shall take precedence of all incumbrances, except such as have attached to the property prior to the commencement of the building.[1] It grows, however, *pari passu*, with the property to which it attaches.[2] It seems well settled that the "commencement" or "beginning" of a building means "the first labor done on the ground which is made the foundation of the building, to form part of the work suitable and necessary for its construction."[3] Consequently mechanic's liens, attaching under such statutes, take precedence of mortgages executed after the building was begun, although the work for which the lien is claimed was not commenced until after the filing of the mortgage.[4]

(*b.*) When the statute declares that "the lien created shall relate to the time when the person furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter," it has

[1] Brown *v.* Smith, 2 Brown, 229; Wells *v.* Canton Co., 3 Md. 234; *e.g.* Md. Rev. Code. art. 67, § 15; Mason *v.* Jones, 2 Barb. 229.

[2] Nazareth Lit. & Ben. Inst. *v.* Lowe, 1 B. Mon. 258; Steigleman *v.* McBride, 17 Ill. 300.

[3] Pennock *v.* Hoover, 5 Rawle, 308; Brooks *v.* Lester, 36 Md. 70; Keystone *v.* Gallagher, 5 Col. 27.

[4] Nelson *v.* Iowa Eastern R. R. Co., 44 Iowa, 71; Delaware *v.* Davenport, 46 Iowa, 413; Brooks *v.* Lester, 36 Md. 70; Denmead *v.* Bank of Baltimore, 9 Md. 185; Davis *v.* Bilsland, 18 Wall. 659; Merrigan *v.* English, 9 Mont. 113, 22 Pac. R. 454.

been held that the lien relates back to the time when the work began, not only as to other liens, but also as to conveyances.[1] Liens may exist upon new property independent of filing, but the privilege is lost when the time prescribed by statute expires.[2]

(*c.*) The statutes of several of the States declare that the lien attaches from the filing of a certain notice or memorandum with some public officer. In such cases a *bonâ fide* transfer of the property before the lien is filed will defeat the lien or claim to preference.[3] It has been generally held that where the law gives the lien only upon filing notice with the county clerk, etc., no lien will be recognized as antedating the filing.[4]

(*d.*) A few statutes fix the period of acquiring the lien at the date of the contract or the completion of the buildings. Nice questions are apt to arise as to the time when a structure is completed; for instance, after a house was finished and sold it was held that a paper-hanger, employed by the purchaser, could have no lien for his work and thereby affect the lien of a mortgagee;[5] while other cases have tended to show that when a house is substantially finished according to the designs of the architect or builder, and only a few minor details remain, it may be regarded as completed, and the lien properly attaches from that time. If a strict construction of the word "completed," as used in the statutes, is adopted, there is nothing to prevent unscrupulous owners from defeating the purpose of the

[1] Kellenberger *v.* Boyer, 37 Ind. 188; Burr *v.* Kerchner, 99 N. C. 263, 6 S. E. R. 108; Keating Co. *v.* Marshall Co. (Tex.), 12 S. W. R. 489.

[2] Welch *v.* Porter, 63 Ala. 229.

[3] Brackney *v.* Turrentine, 14 Ark. 416.

[4] Green *v.* Green, 16 Ind. 253; Quimby *v.* Sloan, 2 Abb. Pr. 93; Wilson *v.* Hopkins, 51 Ind. 233; Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. R. 513.

[5] McCree *v.* Campion, 5 Phila. 9.

lien law by intentionally leaving some trifling part of the work undone. Hence, the abandonment of construction by the owner is to be regarded, for the purposes of these liens, as equivalent to completion.[1] In the same way the abandonment of work by the contractor will not be allowed to affect the rights of subcontractors; and the abandonment is to be construed as the "completion" of the work.[2]

(*e.*) When the statute does not specify the period from which the lien shall attach, the courts will hold that it is acquired from the time when the work is performed or the materials furnished.[3]

§ 239. MORTGAGEES, PURCHASERS, AND OTHER LIENORS. In all cases the mechanic's lien law must be strictly complied with in every particular to give the lienor precedence of *bonâ fide* purchasers or mortgagees.[4] The policy of the law does not favor preferences, but an equal distribution of the assets of an insolvent estate among all the debtors *pro rata*.[5]

The fact that the original owner of a building may have subsequently sold or transferred the same does not bar the lien.[6] In all cases, however, where the sale

[1] Catlin *v.* Douglass, 33 Fed. R. 569. But the claimant may not have the benefit of delay caused by himself in replacing defective portions. Women's Ass'n *v.* Harrison, 120 Pa. 28, 13 Atl. R. 501.

[2] Shaw *v.* Stewart, 43 Kan. 572, 23 Pac. R. 616; Whittier *v.* Logus, 13 Or. 546, 11 Pac. R. 305. There is a difference between "erecting" and "completing" a building. Johnston *v.* Ewing Female Univ. 35 Ill. 518.

[3] McLagan *v.* Brown, 11 Ill. 519; Williams *v.* Chapman, 17 Ill. 423; Camp *v.* Mayer, 47 Ga. 427.

[4] The Farmers' Bank *v.* Winslow, 3 Minn. 86.

[5] Chapin *v.* Perssee, 30 Conn. 461.

[6] Pennock *v.* Hoover, 5 Rawle, 291; Jean *v.* Wilson, 38 Md. 288; Hahn's Appeal, 39 Pa. 409; Collins *v.* Patch, 156 Mass. 317, 31 N. E. R. 295; Dunkle *v.* Crane, 103 Mass. 470.

But in contracts specifying that extra work shall be done at the discretion of the owner, the contractor has a lien against a subsequent purchaser

or mortgage antedates the commencement of the building or other point of time from which the lien dates, it will take precedence of the lien.[1] *Bonâ fide* purchasers and mortgagees have always an interest in the premises sufficient to attack any fraudulent lien claim.[2]

§ 240. LIEN OF THE VENDOR. Mechanic's liens are not given precedence over the vendor's lien if they have notice that the purchase-money is not paid.[3] But if the vendor's lien is lost or suspended, and in the *interim* the mechanic's lien attaches, the former cannot gain priority.[4]

§ 241. RENTS. A lien for materials furnished to a tenant is paramount to the lien of a landlord for rent.[5]

§ 242. JUDGMENTS AND ATTACHMENTS. Judgment creditors are placed upon the same footing as mortgagees, so far as their lien upon the property of the debtor is concerned.[6]

An attachment takes precedence over mechanic's liens incurred after the attachment is laid.

§ 243. HOMESTEAD AND EXEMPTION rights follow the

or mortgagee, if the extra work was performed with his knowledge or consent. Soule *v.* Dawes, 14 Cal. 247.

[1] Jessup *v.* Stone, 13 Wis. 466; Card *v.* Quinebaug Bank, 23 Conn. 355; Templin *v.* R. Co., 73 Iowa, 548, 35 N. W. R. 634. It has been held in Kansas that where mortgages exist on the land, the mechanic's lien yields to the mortgages to the extent of the land-value, but takes precedence as to the increase of value in the total estate produced by the existence of the buildings. Getto *v.* Friend, 46 Kan. 24, 26 Pac. R. 473. See § 273, note.

[2] Walker *v.* Hauss Hijo, 1 Cal. 183; Gere *v.* Cushing, 5 Bush (Ky.), 304; Phillips Mech. Liens, § 241.

[3] Hickox *v.* Greenwood, 94 Ill. 266; Logan *v.* Taylor, 20 Iowa, 297; Cochran *v.* Wimberly, 44 Miss. 503; Phillips Mech. Liens, § 243 *et seq.* See Irish *v.* Lundin, 28 Neb. 84, 44 N. W. R. 80.

[4] Kittredge *v.* Neumann, 26 N. J. Eq. 195; Tanner *v.* Bell, 61 Ga. 584. The vendor's interest, where the vendee has only an equitable title, may be subordinated to the mechanic's lien. See § 250, *infra*.

[5] National Lumber Co. *v.* Bowman, 77 Iowa, 706, 42 N. W. R. 557.

[6] For discussion, see Phillips Mech. Liens, § 248.

same rule. Frequently the statute provides for the priority of mechanic's liens over these exemptions.

§ 244. Co-Lienors. Generally the statutes declare that there shall be no priority among mechanic's lien-holders claiming an incumbrance upon the same property, and that all such liens shall be paid *pro rata*.[1] "Where a statute," says Mr. Phillips, "is silent as to the priority of lien-holders *inter se*, but gives each lien-holder the right to proceed and issue execution and sell, without making others parties, it follows necessarily that the lien claims take precedence from the time of their filing."[2] Statutes specifying that the funds shall be distributed *pro rata* among all the lienors apply only to those of the same class. Contractors who have not paid for the labor or the materials used in the construction of buildings cannot share in the proceeds thereof as lienors, until the claims of those are paid who actually did the work or furnished the materials.[3]

[1] Anshutz *v.* McClelland, 5 Watts, 487; Moxley *v.* Shepard, 3 Cal. 64.
[2] Hall *v.* Hinckley, 32 Wis. 362; Dobbs *v.* Evart, 4 Wis. 451.
[3] Crowell *v.* Gilmore, 18 Cal. 370. See on this subject, Ch. XXXIII.

CHAPTER XXIX.

MECHANIC'S LIENS AGAINST LESSEES, TENANTS, MARRIED WOMEN, AND OTHERS.

§ 245. LESSEES AND TENANTS. The owner of a leasehold is the "owner of the property" within the meaning of the mechanic's lien law, and consequently the interest of a lessee is liable to the lien,[1] unless the contrary is prescribed by the statute. So, also, with a tenant for years. In either case the holder of the fee-simple has no more dominion over the land — and this constitutes ownership — than he who is in immediate possession. If a lessee were not regarded as an owner, any one holding a lease for "ninety-nine years, renewable forever," would be exempt from mechanic's liens for the most extensive improvements put upon the land, and the owner of the fee made liable for an outlay of money in buildings of which he had never dreamed, — indeed, he might be forced into bankruptcy by the extravagance of his tenant. It has therefore been held that he who leases property for a term of years is the "owner" within the meaning of the law,[2] and that a mechanic's lien extends only to the interest of such owner. In Maryland, and several other States, the statute expressly declares that "where a building shall be erected by a lessee or tenant for life or years, . . . the lien shall only apply to the ex-

[1] Choteau *v.* Thompson, 2 Ohio, 114.

[2] Alley *v.* Lanier, 1 Coldw. 540; Choteau *v.* Thompson, *supra*.

tent of the interest of such lessee or tenant."[1] On the other hand, a few of the States' legislatures have enacted that the lien shall not extend to the interest of tenants, but shall attach solely upon contracts made with the owner.[2] In such case the mechanic has no priority of lien upon buildings erected by him at the request of the lessee or tenant, and he will have to seek other legal remedies.[3]

§ 246. TENANT CANNOT CREATE A LIEN ON LANDLORD'S ESTATE. It has generally been held that a lessee or a tenant has no power to charge a lien upon the property of his landlord. This is a common-law doctrine founded upon the soundest justice and good sense. The tenant cannot make either improvements or repairs and charge them to the landlord, without his consent.[4] Consequently, if he builds upon the property of his landlord, no lien is thereby created against the latter, and the interest of the tenant or lessee alone can be sold in execution or otherwise.[5] This rule extends to buildings or improvements made by sub-tenants and other apparent owners of property; in which cases neither the owner of the fee nor the original lessee is liable unless concurring in said improvement. Although an agreement to make repairs and improvements may be one of the covenants of the lease, it does not necessarily render the covenantee liable.[6] There must be a contract or other special authority existing between the lienor and the lienee to charge the estate.[7] The legal relationship of landlord and ten-

[1] Md. Rev. Code, art. 67, § 9.
[2] Lyman v. King, 9 Ind. 3.
[3] Haworth v. Wallace, 14 Pa. St. 118.
[4] Post v. Vetter, 2 E. D. Smith, 248.
[5] Judson v. Stephen, 75 Ill. 255.
[6] Conant v. Brackett, 112 Mass. 18.
[7] Knapp v. Brown, 11 Abb. Pr. N. S. 118.

ant confers no authority upon the latter to incumber the estate of the former in any manner whatever, nor can a mechanic's lien be laid upon the interest of the reversioner.[1] Yet it may sometimes be that under the contract or some rule of law an erection made by a lessee will belong to himself alone; and in such a case the lien covers the entire interest in the building.[2]

§ 247. BUILDING LEASES. The law, in following the policy above indicated, will not allow the very object of the lien to be frustrated by schemes whereby an owner leases land for some short term for building purposes.[3] In such cases the builder is in reality the agent — not the tenant — of the owner.[4] So, where improvements are stipulated in the lease, or where they are erected by the consent of the lessor, he to share in the profits of the building or improvements, it has been held that he is the party in possession, notwithstanding the lease, and that his interest is jointly or severally liable.[5] In all cases where an agency can be established between the lessor and lessee, whereby the former can be shown to be the real principal in a building contract, the lien will lie against the interest of both.[6]

§ 248. MARRIED WOMEN. There is great diversity in the laws of the various States respecting the legal

[1] Dutro *v.* Wilson, 4 Ohio St. 101; McCarty *v.* Carter, 49 Ill. 53.

[2] Schwartz *v.* Saiter, 40 La. Ann. 264, 4 So. R. 77.

[3] Savoy *v.* Jones, 2 Rawle, 3501; Ottiwell *v.* Muxlow, 6 N. Y. Suppl. 518.

[4] Bickel *v.* James, 7 Watts, 9.

[5] Hopper *v.* Childs, 43 Pa. 310; Fisher *v.* Rush, 71 Pa. 40; Wainwright *v.* Barclay, 12 Pa. 221. *Contra*, Havens *v.* West Side Electric Co., 17 N. Y. Suppl. 580. See Beehler *v.* Ijams, 72 Md. 193, 19 Atl. R. 646. Mere knowledge of the erection is in some States sufficient to charge the owner's interest. West Coast Lumber Co. *v.* Newkirk, 80 Cal. 275, 22 Pac. R. 231; Harlan *v.* Stufflebeem, 87 Cal. 508, 25 Pac. R. 686.

[6] Otis *v.* Dodd, 31 N. Y. Supreme Ct. 538; Moore *v.* Jackson, 49 Cal. 109.

status of the property of married women, and naturally enough we find many conflicting decisions as to the liability of the estate of a *feme covert* to the legal operations of mechanic's liens. Not a few of the States have statutes regulating the question, while the courts of others have invariably followed the English rule, holding that a married woman has power over her property as a *feme sole*, and consequently may render it liable for all debts and liens especially charged to her sole and separate estate.

Independent of statute, it has been held, under a lien law requiring the debt to originate in a contract or agreement, that married women, not being competent to contract, cannot originate liens.[1] In States where married women are allowed to control their estates as if unmarried, the lien attaches if the building or improvement was authorized by them.[2] An opposite view is taken by the courts of South Carolina, Pennsylvania, Ohio, and Mississippi.[3]

The policy of the law is not to allow the estates of married women to escape liability for improvements erected thereon at their instigation, and the fiction that their legal existence is merged into that of their husbands should not be upheld to countenance fraud.[4]

"Statutes regulating marital rights, and prescribing in what cases the wife's separate estate may be bound, will control the creation of the lien on her estate."[5] And this independently of special enactments relating to the lien law.[6]

[1] Rogers *v.* Phillips, 8 Ark. 366; Kirby *v.* Tead, 13 Met. 149; Sibley *v.* Casey, 6 Mo. 164.

[2] Yale *v.* Dederer, 18 N. Y. 265.

[3] See, also, Selph *v.* Howland, 28 Miss. 264.

[4] Greenough *v.* Wiggington, 2 Greene (Iowa), 435.

[5] Warren *v.* Smith, 44 Texas, 247; Phillips Mech. Liens, § 98 *et seq.*

[6] Ibid.

But no improvements can be charged to the separate estate of a married woman unless she has expressly or impliedly authorized them.[1] Her husband has no implied authority to create the lien upon her property.[2] She may, however, empower her husband as her agent, and this agency may be expressed in words or implied from her conduct; as where she gives instructions to the workmen.[3]

Purchasers of property from married women are entitled to the legal rights of the vendor.[4]

§ 249. MORTGAGEES. A mortgagee is not the "owner" of the property upon which he holds a temporary legal title, and his interest is therefore not liable for liens created by acts of the mortgagor.[5]

§ 250. INTENDING PURCHASERS IN POSSESSION. A person under contract to purchase, if in actual possession of the property, may be regarded as the owner thereof, and his interest in it be rendered liable to the operation of the lien.[6] But the law is conflicting as to whether he

[1] Warren *v.* Smith, 44 Texas, 247.

[2] Miller *v.* Hollingsworth, 33 Iowa, 224; Dearie *v.* Martin, 78 Pa. 55; Wendt *v.* Martin, 89 Ill. 139.

[3] McCormick *v.* Lawton, 3 Neb. 449; Bruck *v.* Bowermaster, 36 Ill. App. 510; North *v.* La Flesh, 73 Wis. 520, 41 N. W. R. 633; Dodge *v.* Romain (N. J.), 18 Atl. R. 114; Bradford *v.* Peterson, 30 Neb. 96, 46 N. W. R. 220; Watson *v.* Carpenter, 27 Ill. App. 492; Carthage Co. *v.* Bauman, 44 Mo. App. 386; Wilson *v.* Logue, 131 Ind. 191, 30 N. E. R. 1079; Bodey *v.* Thackara, 143 Pa. 171, 22 Atl. R. 754; Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. R. 1018. But see Thompson *v.* Taylor, 110 N. C. 70, 14 S. E. R. 513; Hoffman *v.* McFadden (Ark.), 19 S. W. R. 753. In Huntley *v.* Holt, 58 Conn. 445, 20 Atl. R. 469, the failure of the wife to make objection is held not sufficient in law to estop her from repudiating the lien of one who builds for her husband on her land.

[4] Gray *v.* Pope, 85 Miss. 116.

[5] Cox *v.* Broderick, 4 E. D. Smith, 721. *Contra*, Tompkins *v.* Horton, 25 N. J. Eq. 284.

[6] Stockwell *v.* Carpenter, 27 Iowa, 119; Paulsen *v.* Manske, 126 Ill. 72, 18 N. E. R. 275; Pierce *v.* Osborn, 40 Kan. 168, 19 Pac. R. 656; Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. R. 1; King *v.* Smith, 42 Minn. 286, 44

can charge the estate of the actual owner with buildings or improvements undertaken by him.[1] The circumstances usually regarded as conclusive in charging the vendor are either his agreement to advance money for the erection of the building or his requirement that the vendee shall erect buildings within a certain time. If a written contract can be shown or an agency can be established between the vendor and the proposed purchaser, there can be no doubt that the property can be charged by the latter with the lien.[2] A mere contract to sell the property to the party in possession does not necessarily imply consent of the seller to pay for improvements or alterations.[3]

§ 251. Disseisors. Persons occupying land without authority of the owner cannot charge it with liens or other incumbrances.[4]

§ 252. Minors and Lunatics. An infant or a lunatic is incompetent to contract; he therefore cannot charge his property with liens originating in an agreement

N. W. R. 65; Wingert *v.* Stone, 142 Pa. 258, 21 Atl. R. 812; Meyer etc. Co. *v.* Brown, 46 Kan. 543, 26 Pac. R. 1019. See Galveston Ass'n *v.* Perkins (Tex.), 15 S. W. R. 633; Oliver *v.* Davis, 81 Iowa, 287, 46 N. W. R. 1000.

[1] That they could not, was held, on the facts, in Irish *v.* Lundin, 28 Neb. 84, 44 N. W. R. 80; Pickens *v.* Investment Co., 31 Neb. 585, 48 N. W. R. 473; People's Ass'n *v.* Spear, 115 Ind. 297, 17 N. E. R. 570. That they could, was held in Hill *v.* Gill, 40 Minn. 441, 42 N. W. R. 294; Malmgren *v.* Phinney (Minn.), 52 N. W. R. 915; Kealey *v.* Murray, 15 N. Y. Suppl. 403; Schmalz *v.* Mead, 125 N. Y. 188, 26 N. E. R. 251; Cook *v.* Goodyear, 79 Wis. 606, 48 N. W. R. 860; Leonard *v.* Cook (N. J.), 20 Atl. R. 855; Henderson *v.* Connelly, 123 Ill. 98, 14 N. E. R. 1; Bohn M'f'g Co. *v.* Kountze, 30 Neb. 719, 46 N. W. R. 1123; O'Leary *v.* Roe, 45 Mo. App. 567; McCue *v.* Whitwell, 156 Mass. 205, 30 N. E. R. 1134; Carew *v.* Stubbs, 155 Mass. 549, 30 N. E. R. 219; Miller *v.* Mead, 127 N. Y. 544, 28 N. E. R. 387.

[2] Paulsen *v.* Manske, *supra.*

[3] McGinnis *v.* Purrington, 43 Conn. 143; Walker *v.* Burt, 57 Ga. 20.

[4] Harlan *v.* Rand, 27 Pa. 511.

upon his part.[1] Nor does the fact that the infant, in obtaining the work or materials, represented himself as being of legal age, bar the defence.[2] Nor can a guardian charge the estate of his ward without special statutory authority; an order of a court will not render it liable.[3]

[1] Johnson *v.* Parker, 3 Dutch. (N. J.) 242; Alvey *v.* Reed, 115 Ind. 148, 17 N. E. R. 265.

[2] Price *v.* Jennings, 62 Ind. 111.

[3] Payne *v.* Stone, 15 Miss. 367; Copley *v.* O'Neil, 39 How. Pr. 41.

CHAPTER XXX.

BUILDING CONTRACTS.

§ 253. Necessity of a Contract. To entitle the claimant to the benefit of the mechanic's lien law, a contract express or implied must be shown to have existed between him and the lienee.[1] No one can voluntarily work upon a person's land, or involve his estate in expense not by him contemplated, and hope to incumber such property with a lien for work done or materials furnished.[2] The contract not only must exist, but must be a valid one in every particular (consideration, competency of parties, legality of design, etc.), and must not conflict with restrictions imposed by the Statute of Frauds.

§ 254. Contract by Parol. The contract need not be in writing, unless specially required by statute, for the law presumes that, where one orders materials or prescribes work to be done, he engages to pay for the same.[3] An implied contract is sufficient,[4] and an acceptance of the work or material will usually be sufficient to imply the existence of a contract and render the property liable to the lien. So would overseeing

[1] McLaughlin *v.* Reinhart, 54 Md. 76; Sodina *v.* Winter, 32 Md. 130; Neeley *v.* Searight, 113 Ind. 316, 15 N. E. R. 598.

[2] Sodina *v.* Winter, *supra;* Choteau *v.* Thompson, 2 Ohio, 114; Roberts *v.* Gates, 64 Ill. 374.

[3] Hazard Pow. Co. *v.* Loomis, 2 Disney (Cin.), 544. See *ante*, § 2.

[4] Williams *v.* Canal Co., 13 Colo. 469, 22 Pac. R. 806; Carney *v.* Cook, 80 Iowa, 747, 45 N. W. R. 919.

the work,[1] or any conduct indicating a sanction of the undertaking,[2] as where an owner impliedly makes himself liable for extras.[3]

§ 255. SUB-CONTRACTS. The liability of an owner for work done or materials furnished by persons employed by the original contractor is sometimes prescribed by statute. But such legislative enactments are always strictly construed by the courts, for otherwise there might seemingly be no end to the lienors upon property, and many payments might be enforced for precisely the same work. It is generally the law that, where the owner has notice of the unpaid claims of laborers and others, the property is liable to liens to the extent of the balance due upon the original contract, but no further.[4]

§ 256. To establish the right to the lien, it must be shown that trust was given on the credit of the building, and not merely upon faith in the contractor's paying,[5] or on the responsibility of the owner,[6] although it is not necessary for the contract to specify that the

[1] Wheeler *v.* Hall, 41 Wis. 447.

[2] Alley *v.* Lanier, 1 Coldw. 540.

[3] Trustees Ger. Luth. Ch. *v.* Heiser, 44 Md. 454.

[4] Mayer *v.* Mutchler, 50 N. J. L. 162, 13 Atl. R. 620; Hoagland *v.* Van Etten, 22 Neb. 681, 35 N. W. R. 869; Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. R. 1017; Graf *v.* Cunningham, 109 N. Y. 369, 16 N. E. R. 551; Riggs *v.* Chapin, 7 N. Y. Suppl. 765; Hug *v.* Hintrager, 80 Iowa, 359, 45 N. W. R. 1035; Teahen *v.* Nelson, 6 Utah, 363, 23 Pac. R. 764; Bourget *v.* Donaldson, 83 Mich. 478, 47 N. W. R. 326.

[5] Wetherill *v.* Ohlendorf, 61 Ill. 283; Wis. Planing Mills Co. *v.* Grams, 72 Wis. 275, 39 N. W. R. 531; Poole *v.* Union Pass. R. Co. (Pa.), 16 Atl. R. 736; Eufaula Water Co. *v.* A. P. & S. Co., 89 Ala. 552, 8 So. R. 25; Duncan *v.* Aaron (Del.), 6 Houst. 566; Wagner *v.* Darley (Kan.), 30 Pac. R. 475; Eisenbeis *v.* Wakeman, 3 Wash. 534, 28 Pac. R. 923; Mills *v.* Terry M'f'g Co., 91 Tenn. 469, 19 S. W. R. 328; Mulrine *v.* Lodge (Del.), 6 Houst. 350.

[6] Cotes *v.* Shorey, 3 Iowa, 416.

contractor looks to the enforcement of the lien for payment.

But under some statutes the property is charged whether there is an unpaid balance or not, and the owner can protect himself only by retaining the price till the period for filing notice has elapsed.[1] It is sometimes held, either under a special provision of the law, or upon general principles, that an owner who pays a contractor before the amount is due under the contract and with notice of the furnishing of labor or material, is liable to the lienor for the amount so paid.[2] In New York there must be collusion on the part of the owner.[3] In some States this principle is enforced without regard to the maturity of the debt; it is enough for the subcontractor to give notice of his claim being unpaid.[4]

§ 257. Due Performance of the Contract. In a former chapter I have discussed the principles of building contracts relating to the performance of the conditions therein, the measure of damages, recovery on a *quantum meruit* and *quantum valebat*. The rules there laid down are equally applicable to the enforcement of building debts by mechanic's liens. For example, the architect's certificate must be presented, where the contract calls for it as the proper evidence of performance.[5] The abandonment of the work by the owner or the wrongful discharge of a workman does not bar the operation

[1] Henry & Coatsworth Co. *v.* Evans, 97 Mo. 47, 10 S. W. R. 868. *Contra*, Wiggins *v.* Bridge, 70 Cal. 437, 11 Pac. R. 754; Parker *v.* Scott, 82 Iowa, 266, 47 N. W. R. 1073.

[2] Walsh *v.* McMenomy, 74 Cal. 356, 16 Pac. R. 17. See Anderson Lumber Co. *v.* Friedlander (N. J.), 24 Atl. R. 434; James *v.* Russell (Wis.), 51 N. W. R. 565.

[3] Lind *v.* Braender, 7 N. Y. Suppl. 664.

[4] Burt *v.* Parker Co. (Tex.), 14 S. W. R. 335.

[5] Wolf *v.* Michaelis, 27 Ill. App. 336; Ewing *v.* Fiedler, 30 Ill. App. 202.

of the lien for the amount due to date according to the general principles of contract-performance.[1] The wrongful abandonment of work by a contractor or workman destroys his lien.[2] Moreover, a claim for damages because of the owner's refusal to allow completion (in other words, for the full contract price, less the cost of completion) may be included in the lien.[3] There is, however, this distinction: the policy of the law requires that the provisions of the statute creating a lien be strictly complied with; while in contracts enforced by common law processes and not being dependent upon particular statutes, the court considers the intention of the parties, and looks for substantial, rather than strict, performance of their mutual stipulations.

§ 258. Liability for Materials not Used. An illustration of the strictness of construction is found in decisions holding that the lien will not lie for materials ordered for, but not actually used in, buildings.[4] The authorities, however, upon this point are conflicting, for in many of the States it has been held that, if a debt is contracted for on the credit of the building, and the materials were furnished upon the distinct understanding that they were to be used in its construction, a lien will lie, although the materials were not actually used in the building.[5] This would follow where matc-

[1] Howes *v.* Reliance etc. Co., 46 Minn. 44, 48 N. W. R. 448; Hunter *v.* Walter, 58 Hun, 607, 12 N. Y. Suppl. 16; Watrous *v.* Davies, 35 Ill. App. 542.

[2] Geary *v.* Bangs, 138 Ill. 77, 27 N. E. R. 462.

[3] Charnley *v.* Honig, 74 Wis. 163, 42 N. W. R. 220. *Contra*, Morgan *v.* Taylor, 5 N. Y. Suppl. 920.

[4] Taggard *v.* Buckmore, 42 Me. 77; Hunter *v.* Blanchard, 18 Ill. 318; Houghton *v.* Blake, 5 Cal. 240; Silvester *v.* Coe Mine Co., 80 Cal. 510, 22 Pac. R. 217.

[5] Wallace *v.* Melchoir, 2 Browne, 104, 10 Pa. 413, 24 Pa. 507; Singerly *v.* Doerr, 62 Pa. 91; Stewart Co. *v.* M. P. Co., 28 Neb. 39, 44 N. W.

rials were not used in the building as intended, but upon the same job for outside purposes,[1] or where the materials were not used at all.[2] On the other hand, it has been declared incumbent upon the creditor to show that the goods were to be used upon the building;[3] and that no lien will lie for materials not used because not suitable for the character of the building.[4] It has been argued that to allow a lien to attach upon a building for materials, whether used in its construction or not, would necessarily admit the liens even if the merchandise should be burned up or otherwise destroyed *in transitu*, and that such is not the true intention of the law.[5] In California and Missouri it has accordingly been held that the materials must be used in the construction of the building to render it liable to the lien.[6]

R. 47; Linden Co. *v.* Imperial Co., 146 Pa. 4, 23 Atl. R. 800; Burns *v.* Sewell, 48 Minn. 425, 51 N. W. R. 224.

[1] White *v.* Miller, 18 Pa. 52.

[2] Beckel *v.* Petticrew, 6 Ohio St. 247.

[3] Greenway *v.* Turner, 4 Md. 296; Watts *v.* Whittington, 48 Md. 357.

[4] Odd Fellows' Hall *v.* Masser, 24 Pa. 507.

[5] Hunter *v.* Blanchard, 18 Ill. 318.

[6] Holmes *v.* Richet, 56 Cal. 307; Schulenberg *v.* Prairie Home Ins. Co., 65 Mo. 295.

CHAPTER XXXI.

CHARACTER OF THE WORK AND MATERIALS PROTECTED.

§ 259. LABOR. The statutes generally authorize a lien for "all work done and materials furnished for or about the erection, construction, or repair of any building," etc., while in several of the States the character of the work or materials is more fully defined. The law is usually broad enough to cover all the labor done in or about the building, whether for useful or merely for ornamental purposes; there is no distinction shown. The work of painters, glaziers, plasterers, and paperhangers has been held to come within the law.[1] It is generally conceded that an architect who draws the plans and superintends the erection of the building is entitled to a lien.[2] But it has been held that the mere preparation of plans and specifications,[3] and the doing of other acts, not of superintendence or preparation of material (*e. g.* book-keeping), in connection with the work of an architect, gives no lien.[4] A lien will lie for digging a foundation and carting away the earth,[5] and

[1] Freeman *v.* Gilpin, 4 Penn. L. J. 411; Martine *v.* Nelson, 51 Ill. 422; Merrigan *v.* English, 9 Mont. 118, 22 Pac. R. 454; La Grille *v.* Mallard, 90 Cal. 373, 27 Pac. R. 294.

[2] Knight *v.* Norris, 13 Minn. 473; Mutual B. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389; Price *v.* Kirk, 90 Pa. 47, approving Bank *v.* Gries, 11 Casey, 423; Hughes *v.* Torgerson (Ala.), 11 So. R. 209.

[3] Price *v.* Kirk, *supra*.

[4] Adler *v.* World's etc. Co., 126 Ill. 373, 18 N. E. R. 809.

[5] Hill *v.* Newman, 38 Pa. 151; Pickett *v.* Gollner, 7 N. Y. Suppl. 196.

for teams and labor used for conveying materials;[1] in fact, for all labor necessary to the building.

§ 260. MATERIALS. The lien protects any materials furnished for building purposes. This protection has been held to extend to cooking-ranges and furnaces built in,[2] to lightning-rods,[3] to powder and fuses used in blasting for foundations,[4] to pumps and other stationary and permanent machinery,[5] and to articles of every description ordinarily used in buildings. There is, however, —

§ 261. NO LIEN FOR MONEY ADVANCED TO PURCHASE MATERIALS.[6] Under a statute providing that "all persons furnishing sawmills with timber, logs, provisions, *or any other thing* necessary to carry on the work of sawmills, shall have a lien," it was declared that parties furnishing money for this purpose had no lien whatever.[7] Money advanced is often an important factor in building operations, yet the statute, being designed as a special protection to mechanics and material-men, does not extend to loans, and persons loaning money must look to other securities.

[1] Hogan *v.* Cushing, 49 Wis. 169; McKeen *v.* Haseltine (Minn.), 49 N. W. R. 195.

[2] Schaper *v.* Bibb, 71 Md. 145, 17 Atl. R. 935; U. S. Nat. Bank *v.* Bonacum, 33 Neb. 820, 51 N. W. R. 233.

[3] Quimby *v.* Sloan, 2 E. D. Smith, 594. *Contra*, Drew *v.* Mason, 81 Ill. 498.

[4] Keystone *v.* Gallagher, 5 Colo. 23.

[5] Pond etc. Co. *v.* Robinson, 38 Minn. 272, 37 N. W. R. 99; Goss *v.* Helbing, 77 Cal. 190, 19 Pac. R. 277; Watts-Campbell Co. *v.* Yuengling, 125 N. Y. 1, 25 N. E. R. 1060.

[6] Weathersby *v.* Sleeper, 42 Miss. 741.

[7] Dart *v.* Mayhew, 60 Ga. 104.

CHAPTER XXXII.

PROPERTY SUBJECT TO THE LIEN.

§ 262. WHAT PROPERTY LIABLE. The statutes usually provide that the lien shall attach to the building upon which labor is performed and the land upon which it stands. The word "building" is held to include churches,[1] school-houses,[2] stables,[3] ice-houses,[4] with their foundations;[5] in fact, all structures erected by men for sheltering, manufacturing, and ornamental purposes. Coke-ovens have been held not to be included.[6]

Anything attached to the land becomes part of the freehold, and buildings of nearly every description are consequently part of the realty,[7] and liable to liens under statutes which provide for enforcing the preference upon the land only. This principle would include fixtures[8] or anything necessary or useful connected with the structure, such as pipes belonging to a cold-storage system.[9] But the property to be charged must have some essential connection with the work done, the foundation of the lien being the fact that the petitioner's labor or material has gone to produce some part

[1] Presbyterian Church *v.* Allison, 10 Pa. St. 413.
[2] Shattel *v.* Woodward, 5 Ind. 225.
[3] McIlvain *v.* Hestonville & Mantua R. R. Co., 5 Phila. 13.
[4] Thomas *v.* Smith, 42 Pa. St. 68.
[5] Scott *v.* Goldinhorst (Ind.), 24 N. E. R. 333.
[6] Central Trust Co. *v.* Cameron Co., 47 Fed. R. 136.
[7] Haeussler *v.* Mo. Glass Co., 52 Mo. 452. See *ante*, Ch. XIX., and particularly §§ 159, 160.
[8] Ewell on Fixtures, 296; Gray *v.* Holdship, 17 Serg. & R. 413.
[9] Steger *v.* Arctic etc. Co., 89 Tenn. 453, 14 S. W. R. 1087.

of the entire thing sought to be charged. Thus, work done in repairing and moving a sawmill will not suffice to charge lumber manufactured in the mill,[1] nor will material furnished for a sidewalk,[2] or timbers for scaffolding used in the brick-laying[3] suffice to charge the lot and building.

§ 263. PUBLIC BUILDINGS ARE EXEMPT from mechanic's liens.[4] This exemption is based upon motives of public policy, and follows the rules of common law exempting these from execution. It has accordingly been held that public school-houses,[5] court-houses, public prisons, State penitentiaries, public offices, town halls, municipal buildings of every description, when designed and used for public purposes, are not liable to the lien of mechanics. As a general rule, all property which is exempt from execution is exempt from the lien.[6] Accordingly, —

§ 264. PROPERTY OF PUBLIC CORPORATIONS has been declared exempt from liability to the lien.[7] The authorities upon this point are conflicting, but the deciding circumstance seems to be the object of the structure, and whether or not the community at large is benefited thereby rather than any particular class.[8] Canals, toll-gates, railroad depots, and cars have also usually been exempted.[9]

[1] Russell *v.* Painter, 50 Ark. 244, 7 S. W. R. 35. See Van Etten *v.* Cook, 54 Ark. 522, 16 S. W. R. 477.

[2] Dugan Stone Co. *v.* Gray, 43 Mo. App. 671.

[3] Oppenheimer *v.* Morrell, 118 Pa. 189, 12 Atl. R. 307.

[4] Foster *v.* Fowler, 60 Pa. St. 27.

[5] Brinckerhoff *v.* Board etc., 37 How. Pr. 520; Charnock *v.* Colfax, 51 Iowa, 70, 78 Ill. 58; Jordan *v.* Board, 39 Minn. 298, 39 N. W. R. 801. *Contra*, see 17 Ind. 225.

[6] Bouton *v.* McDonough Co., 84 Ill. 396.

[7] Foster *v.* Fowler, 60 Pa. St. 27.

[8] See discussion of this subject, Phillips Mech. Liens, § 180.

[9] Poles for electric lights, belonging to corporations privileged to use the

§ 265. GENERAL RULE. As a rule, the whole interest of the owner of the property is liable to the lien. It matters not whether the maker of a building contract is the holder of the fee, a mere lessee, or simply entitled to an equitable estate, his entire estate is chargeable for work performed or materials furnished in the construction or repair of a building at his instigation.

A life tenant can charge the estate to the extent of his interest; a party in possession can do the same;[1] so, also, tenants in common and the like; but only to the amount of their interest in the property.

§ 266. A WIDOW'S TITLE TO DOWER IS NOT AFFECTED by a mechanic's lien.[2]

§ 267. LAND UPON WHICH THE BUILDING STANDS, if owned by the party contracting, is liable to the lien. The statutes of the several States vary as to the area of land to which the lien attaches, but the usual provision embraces all the land necessary for the purposes of the building. This is held to mean all the ground reasonably proper and necessary for the enjoyment of the structure. In cities and towns, the rule is defined to mean the lot upon which the building stands, but in country districts the lien attaches to all the land used in connection with the building and the proper enjoyment of it. The statutes generally specify definitely the area of land to which the lien attaches, covering the question of curtilages, appurtenances, etc. Moreover, a lien for materials put into the hoisting-works, etc., of a mine, covers the whole mine.[3]

§ 268. Where two or more buildings stand within

highways, have been held not to be privileged. Badger Lumber Co. *v.* Marion Co., 48 Kan. 187, 30 Pac. R. 117.

[1] Horton *v.* Carlisle, 2 Disney, 184.

[2] Shaeffer *v.* Weed, 8 Ill. 511.

[3] Silvester *v.* Coe Mine Co., 80 Cal. 510, 22 Pac. R. 217.

the area of land covered by the lien, a lien for work or materials furnished for one of them will not attach upon any of the others,[1] unless the work is done upon one entire contract for the whole work.[2] This rule applies, however, only to those buildings which, though located in close proximity to each other, are separate and distinct; for a piazza,[3] a kitchen, back building, or shed connected with the main structure,[4] are generally considered parts thereof, and the lien will attach to each of them.

§ 269. AMOUNT CLAIMED NOT MATERIAL. The lien is not restricted to any amount, as a general rule, although in several of the States the debt must be over twenty-five dollars. The contract price is the limit of the lien where the owner or his agent contracts for the building; but, in cases where the work is not done by his authority, it is competent for him to show that the price agreed upon with the contractor was unreasonably large,[5] or that the sub-contractor had been guilty of fraud, or by mistake had furnished inferior materials.[6]

In New York, California, and several other States the owner cannot be made to pay more than an amount equal to the contract price, and all voluntary or stipulated payments made to the original contractor are

[1] Dallas L. & M. Co. *v.* Wasco Woollen M. Co., 3 Or. 527. *Contra*, Knapp *v.* St. Louis etc. R. R., 74 Mo. 374.

[2] Lax *v.* Petersen, 42 Minn. 214, 44 N. W. R. 3; Glass *v.* St. Paul etc. Co., 43 Minn. 228, 45 N. W. R. 150; Sergeant *v.* Denby, 87 Va. 206, 12 S. E. R. 402; Maryland Brick Co. *v.* Spilman (Md.), 25 Atl. R. 297. See § 293, *infra*.

[3] Rand *v.* Mann, 3 Phila. 376; Whitenack *v.* Noe, 3 Stock. 321.

[4] Miller *v.* Hershey, 59 Pa. St. 64; Pretz's Appeal, 28 Pa. St. 156.

[5] Cattanach *v.* Ingersoll, 1 Phila. 285; Morris *v.* R. Co. (Ind.), 24 N. E. R. 335; Miller *v.* Whitelaw, 28 Mo. App. 639.

[6] Cattanach *v.* Ingersoll, 1 Phila. 285.

deducted from the aggregate to be paid *pro rata* to the lien-holders.[1] The owner is almost universally held responsible, after notice, for claims filed by sub-contractors, to the extent of whatever money he may have in hand due the contractor,[2] and sub-contractors can create a lien upon the building for the amount due.[3]

Mechanic's lien claims are entitled to interest from the date the debt accrues;[4] in Maryland, from the time of recording the claim.[5] The interest is not construed as a separate demand and recoverable as such, but is properly considered part of the lien and enforcible as such.[6] Where a note has been taken, interest will be calculated only from the date the payment of the note falls due.[7]

[1] Doughty *v.* Devlin, 1 E. D. Smith, 625; McAlpin *v.* Duncan, 16 Cal. 127. Yet in some States the contract price is not the limit of recovery. Henry & Coatsworth Co. *v.* Evans, 97 Mo. 47, 10 S. W. R. 868; Chilton *v.* Lindsay, 38 Mo. App. 57.

[2] Pendleburg *v.* Meade, 1 E. D. Smith, 728.

[3] See § 255.

[4] Williamette *v.* Riley, 1 Or. 183.

[5] Trustees Ger. Luth. Ch. *v.* Heise, 44 Md. 454.

[6] Smith *v.* Shaffer, 50 Md. 132.

[7] Lutz *v.* Ey, 3 E. D. Smith, 621.

CHAPTER XXXIII.

EQUITABLE DOCTRINES APPLICABLE TO THE DISTRIBUTION OF FUNDS IN SETTLEMENT OF LIEN CLAIMS.

§ 270. MARSHALLING SECURITIES. The doctrine of marshalling securities, with all its equities, is recognized in the administration of mechanic's lien laws.[1] The lien is in the nature of a mortgage upon the property, and the same principles govern both incumbrances. So, where a lien creditor has his choice of two funds from which he is entitled to enforce his claim, he is bound to resort to the one which will least injure other creditors; but if he deprives the others of their rights by exhausting the fund upon which they could alone rely, the courts of equity will place them in his position so far as he has applied their securities to the satisfaction of his claim. But if the fund to which a creditor should resort is insufficient to satisfy his claim, the above rule does not apply,[2] for his right to marshal the assets of the debtor cannot be barred by subsequent creditors.[3] Nor can the securities be marshalled to the prejudice of a *bonâ fide* purchaser of other property upon which the lien did not operate,[4] for no creditor can have the right of subrogation to a demand against third persons simply for the reason that the assets of the debtor have been exhausted in paying his demand.

[1] Rust *v.* Chisholm, 57 Md. 383; Hamilton *v.* Schwehr, 34 Md. 107.
[2] Ayres *v.* Husted, 15 Conn. 504.
[3] 2 Lead. Cas. in Eq. 218.
[4] Leib *v.* Stribling, 51 Md. 286.

§ 271. SUBROGATION. So, also, has the doctrine of subrogation been applied to mechanic's liens, and it is almost universally held that a surety is placed in the position and entitled to all the rights and equities of a debtor whose indebtedness he has been compelled to pay.

§ 272. APPORTIONMENT. "If there are two or more funds, and some creditors have liens on one fund and some on another, and there is one creditor having a general lien on all the funds, equity will not permit this creditor to take his whole claim out of one of the funds, but will apportion his indebtedness among all, and compel him to take *pro rata* out of all the funds."[1] So, where several houses are built under one contract, and designed for different purchasers, the statutes usually provide that the lien claimant shall designate the amount claimed upon each; and, without statutory regulation of this subject, courts of equity will so apportion lien claims as to give equal payments to all creditors, so far as the law permits.[2] If the creditor has by agreement with the owner thrown his lien entirely upon one of several structures to which it attaches, this arrangement will bind the owner, but will not affect others who would be injured in their liens.[3] If one or more of the buildings have been sold before the lien has attached, the creditor is entitled only to *pro rata* payment from those remaining.[4] This does not apply, however, in those States where the lien is held to attach independent of filing for a fixed period.

§ 273. EXTENSION OF RULES. The statutes of several

[1] Phillips Mech. Liens, § 261, citing Semmes *v.* Boykin, 27 Ga. 47.
[2] Pennock *v.* Hoover, 5 Rawle, 319.
[3] Reilly *v.* Williams, 47 Minn. 590, 50 N. W. R. 826.
[4] McAuley *v.* Mildrum, 1 Daly, 396.

States extend the doctrine of apportionment to the land and buildings, so that an incumbrancer by mortgage may create a lien upon the proceeds of the lot, and the mechanic to the extent of the improvements thereof, for payment of their several claims.[1] Such, also, is the French law,[2] but the objection to such a rule is the difficulty of ascertaining the relative value of each.[3]

[1] Weathersby *v.* Sinclair, 43 Miss. 90. See § 239, note.

[2] Code Napoleon, 2103.

[3] See Phillips Mech. Liens, § 263 *et seq.*, for discussion of this topic.

CHAPTER XXXIV.

LIMITATIONS OF TIME FOR FILING AND ENFORCING THE LIEN.

§ 274. THE CONTINUANCE OF THE LIEN depends entirely upon statutory provisions.[1] In many of the States the lien is barred in fixed periods ranging from one to five years, while in others its benefits depend upon prompt legal action to be taken shortly after filing the statement or account. In some States the lien may be renewed by *scire facias*, as is allowed in the cases of judgments, in which event it remains an incumbrance upon the property for a period equal to the one for which it first attaches. Under some statutes the liens cease after one year, unless continued by order of the court, in which event the order extending it must be filed and recorded, or such continuance is ineffective and the lien is barred. Where suit is commenced within the period required by statute, the lien continues in force *pendente lite*, but the party claiming the benefit of a *lis pendens* must prosecute his suit with reasonable diligence.[2] The fact that the suit is pending is constructive notice to a subsequent purchaser.[3]

§ 275. PROMPT ENFORCEMENT ENCOURAGED. The policy of the law is to encourage a prompt enforcement, in order not only to disencumber the property, but to prevent uncertainty of title and consequent loss to innocent purchasers or mortgagees by allowing these

[1] Eschbach *v.* Pitts, 6 Md. 71.

[2] Erhman *v.* Kendrick, 1 Met. (Ky.) 146.

[3] Wickliffe *v.* Breckinridge, 1 Bush (Ky.) 427; Ambrose *v.* Woodmansee, 27 Ohio, 147.

liens to exist for indefinite periods. In Massachusetts, when the lien law did not fix the time of enforcing the preference, a delay of more than two years was held not to bar the remedy.[1] The lien, however, will not survive independently of statute after the debt is barred by the statute of limitations.[2] Where a definite time is fixed by the statute for filing the lien, it must be strictly complied with, or the claim to a preference is lost.[3] This follows, also, where the enforcement is required to be commenced within a certain period, and no action,[4] or an erroneous action,[5] is taken.

§ 276. COMMENCEMENT OF LIMITATIONS. The time from which the limitation begins depends upon the terms of the statute. Some statutes declare it to begin upon the completion of the building; others upon the completion of the work contracted for. The latter rule gives rise to much difficulty in its application. Where the contractor has abandoned his contract, the time for filing by the sub-contractor begins with the abandonment of the work, not with the completion of the work by the owner.[6] Where a material-man furnishes a quantity of material at divers times, upon the same contract, the running time of limitation is calculated from the delivery of the last item of the order;[7] but if the materials are furnished upon separate and distinct contracts, a lien must be filed for each, and the limitation period will be reckoned from the date of the completion

[1] Busfield *v.* Wheeler, 14 Allen, 139.

[2] Phillips Mech. Liens, § 321.

[3] Eillian *v.* Eigenmann, 57 Ind. 480.

[4] Weston *v.* Dunlap, 50 Iowa, 183.

[5] Bryant *v.* Warren, 51 N. H. 213.

[6] Basham *v.* Toors, 51 Ark. 309, 11 S. W. R. 282; K. M. & L. Co. *v.* Olmstead, 85 Cal. 80, 24 Pac. R. 648.

[7] Bartlett *v.* Kingan, 19 Pa. 341; Pratt *v.* Campbell, 24 Pa. 184.

of each.[1] So with work performed upon separate contracts, though upon the same building; only that portion done within the statutory period will be protected.[2] A running account, however, has been deemed an entire contract, and it is sufficient if the lien is filed or the proceedings commenced within the period of limitation, calculated from the date of the delivery of the last quantity.[3] The court cannot determine whether the work performed or materials furnished was under an entire or a separate contract; this is a question of fact, and for the jury to decide.[4]

There is no lien when the claim is filed too soon.[5]

[1] Livermore *v.* Wright, 33 Mo. 31.

[2] Sweet *v.* James, 2 R. I. 270.

[3] Stine *v.* Austin, 9 Mo. 554. It is said in Cal. Powder Works *v.* Gold Mines (Cal.), 22 Pac. R. 391, that as the lien for materials does not arise until they have been used, the time for filing cannot be regarded as running from the date of delivery.

[4] Holden *v.* Winslow, 18 Pa. 160.

[5] Perry *v.* Conroy, 22 Kan. 716; Roylance *v.* San Luis Hotel Co., 74 Cal. 273, 15 Pac. R. 777, 20 Pac. R. 573; Catlin *v.* Douglass, 33 Fed. R. 569; Willamette Co. *v.* Los Angeles Co., 94 Cal. 229, 29 Pac. R. 629.

CHAPTER XXXV.

DISSOLVING THE LIEN.

§ 277. General Statement. Mechanic's liens upon property may be discharged by the voluntary act, express or implied, of the lienor; by a failure to comply with the statutory provision; by uniting with the claim debts which are not lienable; by giving security; and by payment.

§ 278. Lien Discharged by the Voluntary Act of the Lien-Holder. If a mechanic or material-man, holding a lien upon property, should order the clerk of the court, or other proper officer, to enter satisfaction or a discharge of the lien, the intention being to waive the benefit of the law, the lien would become *eo instanti* dissolved and of no effect; for, if the release proceeded upon a valuable consideration, or is afterwards acted upon by the other party or innocent purchaser, the lien can never be revived.[1] The debt, however, may survive after the lien has been discharged, for the lienor has the right to a personal action on the contract, though his lien's claim be outlawed.

If the lienor purchases the property upon which he holds a lien, the lien is thereby dissolved.[2]

§ 279. Lien Discharged by the Failure of the Lienor to comply with the Statutory Provisions. As has been said before, the lien of a mechanic is purely a creature of statute, not recognized at common law.

[1] Kennedy *v.* Jones, 67 Me. 538.

[2] Foltz *v.* Peters, 16 Ind. 244.

All the requirements of the law creating it must be strictly complied with, or there is no preference gained by the claimant. The reports show that discharges effected by improper compliance with statutes are numerous.

§ 280. LIEN DISCHARGED BY UNITING WITH THE CLAIM DEBTS WHICH ARE NOT LIENABLE. The lien of the mechanic is a preference given to persons for certain claims against property which they themselves helped, by labor or materials, to create, and it would be a manifest injustice to other creditors if these preferred claimants should be allowed to include in their claims items which the law does not specially protect. It has been held that no advantage shall be gained by creditors seeking to enforce liens for more than is lienable. If the items are easily distinguishable, the non-lienable ones will merely be struck out.[1] But in numerous instances the intermingling of non-lien with lien claims has discharged the lien as to both.[2] In general, the claim must also be one in which the work or material serving as its foundation is clearly differentiated. As a lien will not arise where the claim covers matter which is not the subject of a lien, so if this matter cannot be clearly separated and apportioned, no lien is gained.[3]

[1] North *v.* La Flesh, 73 Wis. 520, 41 N. W. R. 633; Pullis *v.* Hoffman, 28 Mo. App. 666; Maynard *v.* Ivey (Nev.), 29 Pac. R. 1090; McCristal *v.* Cochran (Pa.), 23 Atl. R. 444. But see Cannon *v.* Williams, 14 Colo. 21, 23 Pac. R. 456; Willamette etc. Co. *v.* Kremer (Cal.), 24 Pac. R. 1026 (where the house was situated partly on a lot described and partly on one not described; an example of judicial fatuity). In Miller *v.* Shepard (Minn.), 52 N. W. R. 894, one who built a house situated partly on two lots was allowed to separate his claim.

[2] Lombard *v.* Pike, 33 Me. 141; Johnson *v.* Pike, 35 Me. 291; Morrison *v.* Minot, 5 Allen, 403; Whitney *v.* Joslin, 108 Mass. 103; S. & B. Lumber Co. *v.* Strimple, 33 Mo. App. 154; Dugan Co. *v.* Gray, 43 Mo. App. 671.

[3] Adler *v.* World's Pastime Exposition Co., 126 Ill. 373, 18 N. E. R.

But the lien is not lost by claiming a larger sum than is in fact due,[1] or by claiming the lien upon an excessive area[2] or against an excessive number of persons.[3]

§ 281. Discharge implied from giving Security. In only a few of the States is the lien allowed to be dissolved upon giving approved security. Such a provision is an abridgment of the efficacy of the lien, for it forces the lienor to an action at law against the sureties, and recovery is more doubtful than under those statutes which prescribe peremptory means of enforcing the lien out of the property itself.

§ 282. Lien Discharged by Payment. The lien being a protection afforded for a debt, a payment thereof will discharge the lien.[4] Where a party has liens upon more than one piece of property, the debtor, in making payment, may declare which particular lien he desires it credited to, and an acceptance of the money will bind the lienor so to appropriate it. But if no conditions are named when payment is made, the creditor accepts it unconditionally, and has the right to apply it as he prefers.[5]

§ 283. The Death of the Lienee,[6] or the Lienor,[7]

809. See Engfer *v.* Roemer, 71 Wis. 11, 36 N. W. R. 618; Cahill *v.* Capen, 147 Mass. 493, 18 N. E. R. 419.

[1] Thomas *v.* Huesman, 10 Ohio, 152; Harmon *v.* R. Co., 86 Cal. 617, 23 Pac. R. 1024, 25 Pac. R. 124; Albrecht *v.* Lumber Co., 126 Ind. 318, 26 N. E. R. 157; S. C. Lumber Co. *v.* Neal, 91 Cal. 362, 27 Pac. R. 743. *Contra*, if knowingly filed, Uthoff *v.* Gerard, 42 Mo. App. 256; Gaskell *v.* Beard, 58 Hun, 101, 11 N. Y. Suppl. 399; Gibbs *v.* Hanchette, 90 Mich. 657, 51 N. W. R. 691.

[2] C. B. C. Lumber Co. *v.* Simpson, 83 Tex. 370, 18 S. W. R. 812; in the absence of fraud or of injury to other interests.

[3] Ibid.

[4] Kennedy *v.* Jones, 67 Me. 538.

[5] 1 Am. Lead. Cas. 276.

[6] Telfer *v.* Kierstead, 2 Hilt. 577; S. C. 9 Abb. Pr. 418.

[7] Brown *v.* Tress, 59 How. Pr. 345.

will not dissolve the lien.[1] It has been held, however, that where no notice has been filed, though required by law, and the title of the property has passed to another by deed or devise, no lien can be laid against the latter by persons who had contracted with the former owner.[2] The statute under which this decision was rendered provided that the lien should only extend to "the right, title, and interest of the owner *at the time of filing* the lien."

§ 284. A DISCHARGE PROCURED UNDER BANKRUPTCY or insolvency laws does not extinguish the lien. The preference is for a debt due for improving the property upon which it is laid; it is not a personal obligation of the debtor, but an incumbrance upon the particular property, and it therefore does not conflict with such acts. According to the statutes of most of the States the lien attaches, independently of filing the notice, immediately upon performing the work, or furnishing the materials. Either it existed, therefore, and will be recognized by the courts as existing, prior to the insolvency or bankruptcy proceedings, or it will not be preferred to other claims.

§ 285. THE DISSOLUTION OF PARTNERSHIP, whether of contractors or owners, does not dissolve the lien.[3]

[1] Phillips Mech. Liens, § 298.

[2] Crystal *v.* Flannelly, 2 E. D. Smith, 583.

[3] Phillips Mech. Liens, § 301, citing Busfield *v.* Wheeler, 14 Allen (Mass.), 139; Miller *v.* Whitelaw, 28 Mo. App. 639.

CHAPTER XXXVI.

WAIVER.

§ 286. General Statement. Mechanic's liens may be waived by express agreement, by implication, and by acceptance of collateral or other security.

§ 287. Waiver by Express Agreement. Mechanic's liens, like all other privileges, may be expressly waived by those persons whom its provisions are designed to protect. The undertaking of building operations furnishes good and valid consideration to support such a relinquishment, and *vice versâ*.

An agreement entered into by a builder not to enforce payment by incumbering the property by liens, is binding not only upon him,[1] but upon sub-contractors having knowledge of such an agreement.[2] This principle applies where a mechanic agrees to look to his employer only for his pay,[3] or where he stands by and allows the owner to pay over to the contractor the whole sum due to him,[4] or where any conduct of the party furnishing work or materials would reasonably lead to the inference of an understanding that the lien would not be claimed.

Under statutes recognizing the lien as an inchoate

[1] Scheid *v.* Rapp, 121 Pa. 593, 15 Atl. R. 652.

[2] Long *v.* Caffrey, 1 Luz. Leg. R. 188, 93 Pa. St. 526; Bowen *v.* Aubrey, 22 Cal. 566; Pinning *v.* Skipper, 71 Md. 347, 18 Atl. R. 659; Murphy *v.* Morton, 139 Pa. 345, 20 Atl. R. 1049; Dersheimer *v.* Maloney, 143 Pa. 532, 22 Atl. R. 813.

[3] Murray *v.* Earle, 13 S. C. 87; Isenman *v.* Fugate, 36 Mo. App. 166.

[4] Chilton *v.* Lindsay, 38 Mo. App. 57.

incumbrance prior to the actual filing thereof, formal waivers of the right are commonly exacted by purchasers of new buildings. It is important that every one engaged in any part of the construction, from the architect to the lowest sub-contractor, "sign off," as it is called, or otherwise the estate is liable to become incumbered, though in the hands of an innocent purchaser.[1]

A general bond of indemnity is also commonly used, and it is preferable to the method of express waiver, if satisfactory security can be given.

§ 288. WAIVER BY IMPLICATION. A contract or agreement to waive the benefits of the lien may be implied from the actions of the parties.[2]

The Statute of Frauds does not require privileges to be waived in writing, so that, if one party by verbal assurances leads another to believe that he will not claim the lien, the right thereto is barred.[3] So, where a mechanic assures a subsequent purchaser that there is no incumbrance upon the property, he cannot afterwards claim a lien to the detriment of the same.[4] Submission of the dispute to arbitration, under a contract to arbitrate, is a waiver.[5]

§ 289. WAIVER BY THE ACCEPTANCE OF SECURITY. "It has been adopted as a general rule," says Mr. Phillips,[6] "that the acceptance of a higher security than the creditor had before is an extinguishment of the first debt; thus, if a creditor by simple contract accept an

[1] A Form of Waiver and Bond of Indemnity will be found in the Appendix.

[2] Gorman *v.* Sagner, 22 Mo. 137.

[3] Scott *v.* Orbison, 21 Ark. 202.

[4] Huckley *v.* Greany, 118 Mass. 595.

[5] N. Y. Lumber etc. Co. *v.* Schneider, 1 N. Y. Suppl. 441.

[6] Phillips Mech. Liens, § 274.

obligation, this is an extinguishment of the simple contract debt; but the acceptance of a security of an inferior nature, or of a security of equal degree, does not extinguish the first debt." Therefore the acceptance of a bond and warrant of attorney, and an entry of judgment on the bond, is not a waiver or extinguishment of a mechanic's lien.[1]

The decisions are conflicting as to an implication of waiver from the acceptance of negotiable notes and drafts in payment, but the weight of authority indicates that the mere taking of such payments is not waiver of the lien.[2] Such at least is the common law rule.[3] The bill or note must be produced at the trial or its absence accounted for.[4] Otherwise the holder of the note, if it has been negotiated, and the lienor, might both enforce payment, and the debtor be made twice liable for the same indebtedness.

The authorities are even more conflicting in respect to the acceptance of indorsed notes by the lienor, many courts regarding the taking of the security as an absolute waiver;[5] while an equally large number declare that the indorsement should be treated as collateral, and in no sense payment.[6] Where the note is accepted

[1] Phillips Mech. Liens, § 274, citing case of John Thompson, 2 Brown (Pa.), 297; Schenck v. Arrowsmith, 1 Stockt. (N. J.) 314.

[2] McCoy v. Quick, 30 Wis. 521; Jones v. White, 72 Tex. 316, 12 S. W. R. 179; Ford v. Wilson, 85 Ga. 109, 11 S. E. R. 559; Hoagland v. Lusk, 33 Neb. 376, 50 N. W. R. 162. Compare Hill v. Witmer, 2 Phila. 72, with Whitney v. Joslin, 108 Mass. 103.

[3] Laviolette v. Redding, 4 B. Mon. (Ky.) 81; Brady v. Anderson, 24 Ill. 110. See Phillips Mech. Liens, § 276, and cases cited.

[4] Green v. Fox, 7 Allen, 85; Kankakee Co. v. Crane, 128 Ill. 627, 21 N. E. R. 500.

[5] Muir v. Cross, 10 B. Mon. (Ky.) 277; Kankakee Co. v. Crane Co., 138 Ill. 207, 27 N. E. R. 935.

[6] Bashor v. Nordyke, 25 Kan. 222; Mervin v. Sherman, 9 Iowa, 331; McKeen v. Haseltine (Mich.), 49 N. W. R. 195.

as simple collateral security, no waiver is implied, although it has been made payable at some future day.[1] Many of the States have statutory enactments regulating this subject, and generally declaratory of the principle that the mere acceptance of a note or other obligation does not bar the lien.

The acceptance of a mortgage or of a deed of trust[2] by the holder of a mechanic's lien or the recovery of a judgment constitutes a valid waiver.[3]

Receiving payment on account,[4] or merely giving credit, or the taking of a guaranty from a third person,[5] does not waive the lien,[6] unless, in the latter instance, the credit given by the lienor be so extended that no action could possibly be maintained within the statutory period.[7]

[1] Shaw *v.* 1st Pres. Ch., 39 Pa. 226; Ehlers *v.* Elder, 51 Miss. 499.

[2] Trullinger *v.* Koford, 7 Or. 228; Barrows *v.* Baughman, 9 Mich. 213; Kendall Co. *v.* Rundel, 78 Wis. 150, 47 N. W. R. 364. *Contra*, Howe *v.* Kindred, 42 Minn. 433, 44 N. W. R. 311; Hoagland *v.* Lusk, 33 Neb. 376, 50 N. W. R. 162.

[3] State *v.* Drew, 43 Mo. App. 362.

[4] Phillips Mech. Liens, § 286.

[5] St. Paul Co. *v.* Eden, 48 Minn. 5, 50 N. W. R. 921.

[6] The Highlander, 4 Blatchf. 55.

[7] Scudder *v.* Balkam, 40 Me. 291.

CHAPTER XXXVII.

PRELIMINARIES TO ENFORCING THE LIEN.

§ 290. Notice of Intention to Claim the Lien. In most of the States the lien exists for a fixed period, independent of any action whatever on the part of the mechanic or material-man, a sort of inchoate privilege which may or may not be claimed. It would be a manifest injustice to subsequent purchasers or mortgagees, and a positive hindrance to real estate, if this lien were allowed to remain a latent incumbrance upon property for an indefinite time; it is therefore prescribed by the statutes creating the lien that a notice, account, memorandum, or statement thereof shall be filed and recorded with some specified official within a limited time from the time the debt accrued or the building was completed. The fact of the building being new, or of repairs having been recently made, is considered sufficient notice to contemplating purchasers that there may be claims yet to be made for the construction or repairs for a few months, but not for an indefinite time. The positive requirements of the statute as to time of filing the notice or memorandum must be strictly complied with, or the lien is lost.[1] But where the statute fails to provide for a notice, none need be given.[2]

§ 291. Form of Notice. The nature and form of the notice depend upon the particular statutes; so do all

[1] Hoyt *v.* Glenn, 54 Ga. 571; 1 E. D. Smith, 654.

[2] Shoop *v.* Powles, 13 Md. 304.

its other essentials, such as the filing of the contract with the notice, the service, and the recording. It must usually contain the name of the owner, the nature of the claim, the fact of the claim being that of a contractor or sub-contractor, the name of the alienee if the property has been assigned, the name of the claimant, particulars as to the work done or materials furnished, an itemized account, and the amount claimed. It need not be sworn to, unless so required by statute, in which event failure to verify the notice will be fatal on a motion to quash, as the defect is not amendable.[1]

§ 292. CLAIMS AGAINST MORE THAN ONE HOUSE ON THE SAME CONTRACT. In the absence of statutory regulations, one lien claim may be filed against any number of houses where the work is done or materials are furnished upon the same contract;[2] in which case the lien is laid against all the houses jointly, and all are held for its payment. But in Maryland, and in nearly every other State, the claimant is required to designate the amount he intends to claim against each of the several contiguous houses. This relieves the builder of many inconveniences. If the lienor be compelled to apportion his debt among the several houses, the owner has a better opportunity to dispose of them singly, for if all were incumbered he would be compelled to lift the lien from them all before he could sell any, and to accomplish this he would probably have to sacrifice them all to a single purchaser or syndicate. But it has been said in California that the failure to make such a des-

[1] Hallagan *v.* Herbert, 2 Daly, 253.

[2] Taylor *v.* Montgomery, 20 Pa. St. 443; Tenny *v.* Sly, 54 Ark. 93, 14 S. W. R. 1091. *Contra*, Wilcox *v.* Woodruff, 61 Conn. 578, 24 Atl. R. 521, 1056. See § 268.

signation merely affects the priority of the lien over others, and cannot be complained of by the owner.[1]

§ 293. DESCRIPTION. The preliminary notice and lien claim must contain a description sufficiently definite to indicate without doubt or obscurity the property intended to be charged. Without such a description the lien claim will not attach, for there is in reality no notice to the owner if property is not described at all or is described so imperfectly that he cannot distinguish which is referred to. Again, the lien extends only to the premises described in the claim filed; so, where a claim is filed merely against a building and the ground upon which it is erected, it does not extend to the ground adjacent thereto, although it would have embraced the same if further description had been given.[2] Where the statute does not require a description of the property in the notice, none need be given.[3] Yet it is always advisable that there should be no room left for the owner to doubt what particular property is intended.

As a general rule, any description will be sufficient if it recites enough to enable a party familiar with the locality to locate the property with reasonable precision. It is not always necessary, however, for the description to be so precise as this rule indicates, but yet it should identify the property so that it can be distinguished from others and found if necessary.[4] Claims describing the premises as located upon the

[1] Booth *v.* Pendola, 88 Cal. 36, 23 Pac. R. 200; S. C. 88 Cal. 36, 25 Pac. R. 1101. See § 272, where the case of Reilly *v.* Williams decides a question nearly related to this.

[2] McDonald *v.* Lindall, 3 Rawle, 492.

[3] O'Halloran *v.* Leachey, 39 Ind. 150.

[4] See McPhee *v.* Broderick, 145 Mass. 565, 14 N. E. R. 923.

southwest corner of a certain street,[1] or by a certain number on such-and-such a street,[2] or similar designations, have been held sufficient, but not a location naming only the county.[3] The description of the property given in the bill of complaint or petition should correspond substantially with that of the notice.[4] It is generally held good if no other property will answer to a similar description,[5] or if the person to be charged was not misled by the misdescription.[6] So, where property is described as in deeds thereof, and the description is good as to rules applicable to deeds, it will be sufficient for mechanic's lien claims.

It is for the jury to say whether the description is sufficient.

If an erroneous description of the property has been made in the claim, it may be corrected within the time allowed for filing thereof;[7] but not afterwards to the detriment of subsequent purchasers or *bonâ fide* incumbrancers.[8] "Objection to the notice or complaint, on the ground of description, should be made either before or at the trial of the cause, and not on appeal."[9]

[1] Caldwell *v.* Asbury, 29 Ind. 451.

[2] Buckley *v.* Bouteller, 61 Ill. 293.

[3] Penrose *v.* Calkins, 77 Cal. 396, 19 Pac. R. 641.

[4] Bristow *v.* Evans, 124 Mass. 548.

[5] Shaffer *v.* Hull, 2 Penn. L. J. 93; Seaton *v.* Hixon, 35 Kan. 663, 12 Pac. R. 22.

[6] National Lumber Co. *v.* Bowman, 77 Iowa, 706, 42 N. W. R. 557; Vogel *v.* Luitwieler, 52 Hun, 184, 5 N. Y. Suppl. 154; Casey *v.* Ault, 4 Wash. 167, 29 Pac. R. 1048.

[7] Gray *v.* Stevenson, 50 Iowa, 173; Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. R. 748.

[8] Knabb's Appeal, 10 Pa. St. 186.

[9] Phillips Mech. Liens, § 391, citing Caldwell *v.* Asbury, 29 Ind. 451, etc.

CHAPTER XXXVIII.

ENFORCING THE LIEN.

§ 294. JURISDICTION. The States have exclusive jurisdiction over the real estate located within their limits, and mechanic's liens are therefore enforcible only in the State where the property is situated. The United States Courts have no authority to enforce such liens unless the property is located in territory over which they have exclusive jurisdiction, or under seizure by government process.

The statutes usually define the particular court which shall exercise sole jurisdiction over mechanic's liens.[1]

§ 295. NOTICE OF SUIT. To give the court jurisdiction over the parties, it is but reasonable and just that the defendant should have notice of the action instituted against him; so it is always provided that he shall either be served by summons or other legal process, or given constructive notice by advertisement or otherwise.

Service of notice of the institution of the suit is sometimes required by statute to be preceded by a notice of intention to claim the lien, and such provision must be strictly complied with, or the lien will not attach. If the statute does not provide the method of serving constructive notice upon defendants, such notice will be void.[2] In several States an advertisement in certain newspapers for a stated period is authorized

[1] Phillips Mech. Liens, § 313 *et seq.*

[2] Falconer *v.* Frazier, 15 Miss. 235.

by statute, but frequently the notice is required merely to be posted upon the premises.

When a notice is served in a manner not authorized by law, the defendant may make a motion in arrest of judgment.[1]

§ 296. The Bill of Complaint, or Petition, required by many of the States as the commencement of proceedings, should set forth all the facts essential to show the petitioner's right to claim the benefit of the lien.[2] If it fails to make out a *prima facie* title to the lien, no issue can be framed, though the defendant file a general denial of the facts.[3] The declaration or petition, when defective, is fatal unless an amendment be allowed.[4] It should strictly follow the statutory requirements, and the omission of a single averment may render it void.[5] In general it should aver that the defendant was the owner or reputed owner of the lot or premises upon which the building was erected or repaired; that a contract was entered into by the complainant and the defendant; the amount claimed and the value of the work performed (a bill of particulars is required by many of the statutes); the time when the work was performed or the materials furnished; and the fact of having filed a preliminary claim; and compliance with all special requirements of the law.

§ 297. Form of Petition. There is no particular form of petition prescribed. The statute sought to be enforced should be carefully considered, and its every

[1] Falconer *v.* Frazier, 15 Miss. 235; Schell *v.* Leland, 45 Mo. 289.

[2] Conright *v.* Thomson, 1 E. D. Smith, 661; Mason *v.* Heyward, 5 Minn. 74.

[3] Doughty *v.* Devlin, 1 E. D. Smith, 625; Dewey *v.* Fifield, 2 Wis. 73.

[4] Duffy *v.* Brady, 4 Abb. 432.

[5] Hunter *v.* Truckee Lodge, 14 Nev. 24; Phillips Mech. Liens, § 403; Crowl *v.* Nagle, 86 Ill. 437.

requirement strictly followed in the preparation of the bill. It should show that the complainant has performed all the preliminary acts made essential by the law, and that its object is to enforce payment of the lien claim.[1] It need not set forth, however, notice of sub-contractor to owner, where such notice is not the foundation of the action.[2] If the statute requires that the petition shall be sworn to, this of course must be done; but where no such requirement is made, no affidavit is necessary, and the bill will be sufficient if signed by the attorney of the plaintiff.[3]

§ 298. PROCEDURE. Proceedings to enforce the lien of a mechanic are *in rem* and not *in personam;* the suit is against the property charged rather than against the defendant personally.[4] Yet the action is not wholly *in rem;* for, arising as it does upon a contract *in personam*, it applies only to the interest of the party defendant in the property.[5] The law does not authorize a personal judgment arising from the lien claim, unless specially prescribed by the statute,[6] for the effort to enforce the preference is *primâ facie* proof that the plaintiff looks rather to the property for payment than to the personal responsibility of the debtor. If he fails in his efforts to enforce his lien, he is not entitled to a judgment on the contract.[7]

[1] Foster *v.* Poillon, 1 Abb. Pr. 321.

[2] Cornell *v.* Matthews, 3 Dutch. 522.

[3] Brown *v.* La Crosse City, 21 Wis. 51. See Graf *v.* Cunningham, 109 N. Y. 369, 16 N. E. R. 551; Hentig *v.* Sperry, 38 Kan. 459, 17 Pac. R. 42.

[4] Grant *v.* Vandercook, 57 Barb. 165; Conkright *v.* Thomson, 4 Abb. Pr. 205; Quimby *v.* Sloan, 2 Abb. Pr. 93; Gordon *v.* Torrey, 2 McCart. Ch. (N. J.) 112; Miller *v.* Barroll, 14 Md. 173; Carson *v.* White, 6 Gill, 17; Delahay *v.* Clement, 4 Ill. 201.

[5] Redman *v.* Williamson, 2 Iowa, 488.

[6] Sinclair *v.* Fitch, 3 E. D. Smith, 677.

[7] Grant *v.* Vandercook, *supra.*

The proceedings upon a mechanic's lien, like the lien itself, depend entirely upon legislative enactments. The common law writ of *scire facias* is the general method authorized by the statutes, although in many of the States the proceedings closely resemble the foreclosure of a mortgage, and in others it is conducted according to chancery rules.

It should be remembered that the lien claim and the action for the debt are independent remedies,[1] and the plaintiff may resort to both, at the same time or separately, to enforce payment;[2] but he can obtain only one satisfaction.[3]

§ 299. DEMURRERS. The defendant has the usual privilege of demurrer, as in other actions at law.[4] The rules of pleading govern the framing of demurrers, and short pleas cannot be accepted as fulfilling the object of the demurrer.[5] As in other cases, questions of law should be here raised in connection with the plaintiff's legal title to the lien and the liability of the property thereto, and other issues of law should be disposed of before the trial of issues of facts.[6] Indeed, this practice is specially recommended, for many strictly formal errors in the pleadings may be taken by the court as waived, upon motions in arrest of judgment after pleading to the merits,[7] and special demurrers to matters not raised in argument are not always upheld by the courts.[8] The question whether

[1] McNiel *v.* Borland, 23 Cal. 144.
[2] Webb *v.* Van Zandt, 16 Abb. Pr. 190.
[3] Corn Ex. Co. *v.* Babcock, 8 Abb. Pr. N. S. 256.
[4] Brien *v.* Clay, 1 E. D. Smith, 649.
[5] Lee *v.* Burke, 66 Pa. St. 336.
[6] Waldo *v.* Richter, 17 Ind. 634.
[7] Lee *v.* Burke, *supra;* Scholl *v.* Gerhab, 93 Pa. 346.
[8] Smith *v.* Manice, 1 Code, N. S. (N. Y.) 283; Phillips Mech. Liens, § 415.

certain property is within the lien law must be decided upon evidence at the trial, and therefore cannot be raised upon demurrer;[1] nor will a general demurrer to the whole complaint be sustained.[2] Yet many *prima facie* defects to the lien claim may be taken in motion to quash the *scire facias*.[3] "The authorities give the rule," says Mr. Phillips, "that a pretended claim should, on motion, be stricken from the record when, by reason of defective and irregular statement, it is not brought within the benefit of mechanic's lien legislation."[4] A motion to quash is proper where advantage is sought to be taken of the absence of affidavit when required by law,[5] or the lack of sufficient description of property.[6] In many of the States a demurrer and motion to quash are optional. But the latter method should not be taken to raise questions of constitutionality, or any objections save those tending to show beyond peradventure the absence of any valid claim.

§ 300. PLEADING AND PRACTICE. In those States where the lien is enforced by chancery proceedings, the usual practice in equity prevails;[7] and in those where the writ of *scire facias* is resorted to, thec ommon law pleadings, so far as applicable, are observed, subject to local modifications. Generally speaking, the ordinary rules of pleading and practice govern.[8]

Rules of pleading, usually observed by the courts invoked, will not be violated in the enforcement of

[1] Coddington *v.* Beebe, 5 Dutch. 550.
[2] Jaques *v.* Morris, 2 E. D. Smith, 639.
[3] Baker *v.* Winter, 15 Md. 1.
[4] Phillips Mech. Liens, § 416.
[5] Loring *v.* Flora, 24 Ark. 151.
[6] Bourgette *v.* Hubinger, 30 Ind. 296.
[7] Sutherfield *v.* Ryerson, 24 Ill. 517.
[8] Duffy *v.* McManus, 3 E. D. Smith, 657.

lien claims, although the lien is specially declared to be remedial.[1] For instance, a plea allowed only in equity will not be permitted as a defence where the lien is sought to be enforced in a court of law.[2]

§ 301. AMENDMENTS are never allowed unless authorized by statute.[3] The lien being purely a creation of statutory law, the liberality of common law rules of pleading, allowing amendments during certain stages of the proceedings, do not apply. But in most of the States liberal provisions have been made allowing amendments for all defects which do not change the form of action.[4]

§ 302. COSTS. Costs are discretional with the court,[5] unless otherwise provided for by statute. The lien extends to the costs.[6]

§ 303. APPEALS. The right of appeal is allowed in mechanic's lien judgments, as in other civil suits. The rules of law governing ordinary appeals are usually applied to this remedy.

[1] Brady *v.* Anderson, 24 Ill. 110; Kees *v.* Kerney, 5 Md. 419.

[2] Brown *v.* Morison, 5 Ark. 517.

[3] James *v.* Van Horn, 39 N. J. L. 356; Haviland *v.* Pratt, 1 Phila. 364.

[4] Bailey *v.* Johnson, 1 Daly, 61. See discussion, Phillips Mech. Liens, § 426 *et seq.*

[5] Kaye *v.* Bank of Louisville, 9 Dana, 261.

[6] Albers *v.* Eilers, 18 Mo. 279.

APPENDIX.

GLOSSARY AND FORMS.

GLOSSARY OF WORDS AND TERMS FREQUENTLY USED BY BUILDERS, ARCHITECTS, ETC.

ABACUS, a square or oblong level tablet on the capital of a column, supporting the entablature. The abacus is oblong in Doric and Tuscan architecture, but has concave sides with truncated angles in Ionic, Corinthian, and Roman orders.

ABUTMENT, a part of a pier or wall supporting an arch. The abutments of a bridge are the walls adjoining the land which support the ends of the roadway, or the extremity of the arch or arches. It is sometimes called an *impost* when the arch is a semi-circle.

ALCOVE, a niche or recess in a chamber, where one may recline, or where a bed may be placed.

AMPHITHEATRE, a spacious building of an elliptical form. The Roman amphitheatre, unlike modern theatres having a semicircle of seats fronting a stage, had the seats arranged all around the centre, where the gladiators fought.

AQUEDUCT, an artificial channel by which water is conveyed.

ARCH, an arrangement of bricks, stones, or other materials over an open space, by which they are made to support a superincumbent weight.

ASHLAR, a building-stone squared and hewn, as distinguished from rough stones as they come out of the quarry without being specially shaped. The term is usually applied to square stones nine inches in thickness.

ASTRAGAL, a small, semicircular moulding, sometimes made to represent beads or berries.

BACK OF A BOARD, rafter, slate, or slab, the upper side.

BACK OF A HIP, the upper edge of the hip rafter, between the two sides of a hipped roof, formed to an angle so as to range with the rafters on each side of it.

BACKER, security; in slating, a narrow slate laid on the upper side of a broad slate, where the slates begin to decrease in width.

BALCONY, a gallery in front of a window, or a projection from a wall generally, with a balustrade around it, and supported by consoles or brackets or pillars.

BALUSTERS, small staffs or pillars set in a line at short distances apart, and supporting a rail cornice or coping. Generally used in building stairs.

BALUSTRADE, a connected series of balusters, together with the rail, cornice, or coping, which they support. It is used around balconies, altars, stairs, etc., and may be of wood, stone, or metal.

BAND, any ornament continued horizontally along a wall, or by which a building is encircled.

BAND OF A SHAFT, the mouldings by which the pillars and shafts are encircled in Gothic architecture. Several bands placed at equal distances along the body of a lengthy shaft are sometimes called *shaft rings*.

BANDELET, any narrow, flat moulding.

BAR IRON, a lengthy piece of pig-iron prepared in strip, and rendered malleable for use of the blacksmith.

BASE, (1) the foot of a pillar on which a shaft rests; (2) any support; (3) the foundation of a tower.

BASILICA, a tower or court hall, a palace or cathedral.

BAS-RELIEF, the projection of a figure or ornament from the plane on which it is sculptured.

BATTEN, a species of sawed timber, smaller than what are usually called planks. They generally measure 12 to 14 feet in length, 7 inches in breadth, and $2\frac{1}{2}$ inches in thickness. Cut into two boards, they are sometimes used for flooring.

BATTER, a verb signifying the position of a wall, piece of timber, tower, etc., sloping inward.

BEAD, a small, round moulding. (See ASTRAGAL.)

BEAM, (1) a strong, horizontally placed piece of timber used to resist a force or weight; (2) the main timber of the building, ship, or loom.

BED, the surface on which stones or bricks of walls lie in courses.

BED OF A SLATE, the lower side.

BEVEL, an instrument for taking angles, and for adjusting surfaces to the same inclination. One side of a solid body is said to be bevelled with respect to another when the angle contained between the two sides is greater or less than a right angle.

BIRD'S MOUTH, the inner notch cut on the end of a piece of timber, so that it may be received on the edge of another piece, as a rafter.

BLOCKING-COURSE, the direction of the masonry or brick-work on the top of a cornice.

BOND, that connection of bricks and stones formed by lapping them upon one another in carrying up the work, so as to form an inseparable mass of building by preventing the vertical joints falling over each other.

BOND STONES, or bricks, are those which run through a wall at right angles to its face, so as to hold or bind it together.

BOND TIMBER is that laid in walls to hold them longitudinally together while the work is setting.

BOTTOM RAIL is the lowest rail of a door, or other panel-work.

BOXING or LINING is the covering of an inner surface; for instance, the boxing of window-shutters is the piece which forms the back of the recesses into which the shutters fold.

BRACE, an oblique piece of wood, used to bind together the principal timbers of a roof or other wooden structure. A brace used to support a rafter is sometimes called a strut.

BREAK, any projection from the building's surface.

BRICK TRIMMER, or TRIMMER'S ARCH, a brick arch abutting against the wooden trimmer under the slab or hearth of the fireplace, to prevent the communication of fire.

BRIDGE, a structure of masonry, of one or more arches, raised for passing over a river, roadway, etc.

CABLING, the moulding by which the hollow parts in the flutes of columns and pilasters in architecture are partially filled.

CAISSON, a boarded framework or vessel in which the piers of a bridge are built, gradually sinking as the work advances, till its bottom rests on the bed of the river.

CAPITAL, the top or head of a column or pilaster.

CARYATIDES, figures of women used as columns or pillars.

CASEMENT, a frame upon which windows are hung by hinges to open and shut.

CASTING or WARPING, the bending of the surfaces of a piece of wood from their original position.

CENTRING, the temporary woodwork upon which an arch is built.

CLAMP, a piece of wood fixed to the end of a board with a mortise and tenon, or with a groove and tongue, so that the fibres of the piece thus fixed traverse those of the board, and thus prevent it from

casting; the piece at the end is called a clamp, and the board is said to be clamped.

COFFER, a deep panel in a ceiling, vault, or dome.

COFFER-DAM, a water-tight structure for excluding water from the foundation of bridges, quay-walls, etc., so as to allow of their being built dry.

COLLAR-BEAM (or Straightening-beam), the horizontal tie connecting a pair of rafters. Large roofs usually have several collar-beams.

COMPLETED, finished, ready for delivery of the keys; distinguished from erected, q. v.

CONGLOMERATION, a heap or mass of materials heaped promiscuously together.

CORNICE, the projection which crowns the entablature, or any other part to which it is attached.

CORONA, the lower member of the cornice.

CORRIDOR, a gallery or passage leading to several rooms, each of which has a door opening upon it.

COURSE, a continuous range of stones or bricks of uniform thickness.

CROWN, or KING-POST, in carpentry, is the one which in roofs stands vertically in the middle between the two principal rafters.

CUPOLA, or LANTERN, a spherical vault, or concave ceiling, on the top of a building, usually forming a window in the roof, but often a small room on the top of a dome.

DADO, (1) in architecture, the cubic block which forms the body of a pedestal; (2) in carpentry or in papering, it may be a surface running around the bottom of the walls of a room, about three feet in height.

DISCHARGE, the relief afforded to any part of a building of which the weight is to be borne.

DOVETAILING, the method of fastening boards or timbers together by letting one piece into another, in form of the expanded tail of a dove.

EAVES, the edge of a sloping roof which overhangs the wall, for the purpose of throwing off the water; when there is no concealed gutter, and the water drops directly to the ground, they are called "dripping eaves."

ELBOWS, the sides of panelled work.

ENTABLATURE, that part of a design in classic architecture which surmounts the columns and rests upon the capitals. It consists of the architrave, frieze, and cornice.

ERECTED (stood up); a building may be "erected" when the walls are up, and materials on the ground to complete it. There is a great difference between *erecting* and *completing* a building.[1]

EYE OF A DOME, the aperture at its summit.

FAÇADE, the exterior front or face of a building.

FACING, the visible part of any work.

FESTOON, ornamental carved work representing wreaths of flowers, leaves, or fruit.

FINE STUFF, in plastering, a composition of slacked lime carefully sifted, with a quantity of hair and a little fine sand. Fine stuff is used in common ceilings and walls set to receive paper or color.

FIRST COATING, in plastering, is called "laying" when on lath, and "rendering" when on brick; in three-coat work upon lath it is called "picking up," and upon brick "roughing in."

FLASHINGS are pieces of tin or other thin sheet metal used to lap over gutters and pipes to hold them firmly to walls.

FLATTING, a coat of paint which leaves no gloss on the surface.

FLUE, the open aperture of a chimney from the fireplace to the top of the shaft.

FLUSH, the even surface of two adjoining masses.

FLUTES or FLUTINGS, the mouldings, in the form of hollows or channels, cut vertically on the surface of columns. Flutes are said to be cabled when they are filled to about one half their height from the base with a convex bead, to strengthen the columns and protect the flutes.

FOOTINGS, the spreading courses at the foundation of walls.

FRAMING, the rough timber-work of a house, including the flooring, roofing, ceilings, and beams.

FRET or FRETTE, a continuous chain of bead-like ornaments running vertically and horizontally at equal distances in both directions.

FRIEZE, the central portion of the entablature. The word is also frequently used to mean any enriched or ornamental band.

FRONTISPIECE, the front or principal face of a building, usually referring, however, to the decorated entrance. It is sometimes called "frontis."

FURNITURE, the external brass-work of locks, knobs, etc.

GABLE, the triangular part of a wall, between the top of the side walls and the slopes of the roof. The whole wall, of which the gable forms a part, is called a "gable-end."

GIRDER, the main beam in a building, used to support and bind

[1] See Johnston *v.* Ewing Female University, 35 Ill. 518, for distinction.

joists, walls, arches, etc. Girders are frequently made of cast iron, but may also be made of wood.

GROOVE, a sunken rectangular channel, usually cut near the edge of a moulding, stile, rail, or timber, into which a tongue corresponding to its section is inserted.

GROUND-PLATE, the lowest plate of a wooden building, for supporting the upright posts. Sometimes called the "sill."

GROUNDS, pieces of wood, even with the plastering, to which the wooden finishings are attached.

GROUT, mortar in a half liquid state.

HAMMER-BEAM, part of the open timber roof, forming a truss at the foot of the rafter, acting as a tie.

HEADERS, bricks or stones with the short faces in front.

HEADING COURSES, those in which the stones or bricks are laid with the headers.

HIPS, the rafters at the angle where two sloping roofs meet. A "hipped roof" is one in which the ends slope so as to form a hip on each side.

HOLING, piercing slates with holes for nailing.

IMPAGES, the rails of a door.

IMPOST, the point upon which the arch rests on a column or wall.

INVERTED ARCHES, those in which the keystone is the lowest portion.

JACK TIMBERS, those shorter than the other pieces in the same range.

JAMB, the side of an aperture in walls, such as of doors or windows.

JOGGLE, a notch or curve in joints, used in fitting stones together to prevent them from slipping.

JOINERY, the art of joining or framing together the wooden finishings of houses or buildings.

JOISTS, the heavy timbers which support a floor or ceiling.

KEY, (1) in joinery, the piece of wood inserted in the back of another whose grain runs in a different direction, to prevent warping; (2) a piece of wood inserted between two pieces of timber, and let into both, to prevent their parting lengthways.

KEYSTONE, the centre stone of an arch.

KING-POST, the middle post of a trussed framing, for supporting the tie-beam at the under or lower ends of the struts.

KNEE, timber bent to receive other timber, to relieve weight or strain.

LANTERN. See CUPOLA.

LATHS, small strips of wood, principally used for making a basis for plastering, slating, and tiling.

LEDGERS, pieces of timber in scaffolding, placed horizontally, and running parallel with the wall opposite to which they are erected.

LIME AND HAIR, a mixture of lime and hair for first coat, and usually called "rough" or "coarse stuff."

LINTEL, the horizontal bearer over doors, windows, and over openings in the wall, usually made of stone or wood.

LISTING, the cutting away of sap from the edge of boards.

LUFFERS, the boards placed over others in such a way as to admit air without permitting air to penetrate.

MANTEL, the cross-piece running horizontally over the jamb of a chimney.

MIDDLE RAIL, in joinery, the rail of a door which is level with the hand, and which is generally where the lock is placed.

MITRE, the point or line of union of mouldings meeting an angle.

MORTISE, a species of joint, wherein a hole or incision of a certain depth is made in the thickness of a piece of wood, for the reception of another piece called the "tenon." The tenon is a projection, generally rectangular in form, cut so as to fit exactly into the mortise. The framing of doors, shutters, and windows is generally fitted together with mortise or tenon joints.

MOSAIC WORK, small square pieces of stone, or glass, or other material, of different colors, so arranged as to give the effect of painting.

MOULD, the model or pattern from which workmen execute mouldings, ornaments, etc.

MOULDINGS, the curved and plane surfaces used as ornaments in cornices, panels, arches, etc.

NAKED FLOORING, the timber-work for supporting the boarding of a floor or ceiling, or both.

NEWEL POST, the plain or ornamental post placed at the lowest step, which receives the hand-rail.

NICHE, (1) a recess formed in a wall, to contain a statue or other ornamental figure; (2) any designed cavity in a wall.

NOSING OF STEPS, the rounded projecting edges of the treads or covers of the steps.

NOTCH BOARD, the board of a stairway grooved out to receive the ends of the steps.

NUT or BURR, a small piece of iron with a spiral grooved hole in

the centre, adapted to an external cylindrical spiral on the end of a bolt.

OFFSET, the upper surface of the lower part of a wall, left by reducing the thickness of the superincumbent part on one or both sides.

PARTY-WALLS, the walls dividing separate buildings, and used in common between them.

PIAZZA, used as a synonym of "veranda," to mean a sort of balcony, but strictly meaning a square, open space surrounded by buildings.

PIER, (1) the block of solid wall between doors, windows, etc.; (2) the solid mass of masonry built to receive the arch of a bridge; (3) used synonymously with "pillar" and "abutment."

PIG-IRON, short bars of iron as they come from the smelting furnace.

PILES, large timbers driven into the earth to make a foundation to build upon on marshy ground or water-covered surfaces.

PITCH, the sloping of a roof.

PLAT-BAND, a square moulding whose projection is less than its height or breadth.

PLINTH, the square solid under the base of a column or wall.

PUT-LOGS, small timbers which lie between the wall and the poles of the scaffolding, and on which the scaffolding rests.

RAFTERS, the inclined timbers of the sides of a roof.

RECESS, a part of a surface below the general surface of the work.

RIBS, curved timbers whereto the laths are nailed in arched or coved ceilings.

RISER, the upright portion of a step.

RUSTIC, masonry in which various stones or courses are marked at the joints by splays or recesses.

SAG, the curvature in the centre of a horizontal piece of timber.

SASH, the framework which holds the glass in a window.

SCANTLING, small timbers, as studding, rafters, etc.

SLEEPERS, timbers on which the ground-floor rests, usually applied in those cases where there is no cellar or a bad foundation underneath.

SPARS, the common rafters of a roof.

SPRINGING, the lower part of an arch.

STRETCHERS, bricks or stones laid lengthwise.

STRUT, any piece of joist pressed endwise.

SUB-BASE or SUB-BASE, the cornice of the upper base of a room,

which is used to finish the dado, and to prevent injury to the plastering.

TENDER, (1) used synonymously with "bid," an offer to do work for a fixed price; (2) an offer in satisfaction of a debt.

TONGUE, the projecting part on the edge of a board which is intended to be inserted into a groove of another piece.

TRIMMERS, pieces of mitre framed at right angles to the joists against the way of chimneys.

TRUSS, a framework composed of tie-beams, rafters, struts, etc., for roofs.

UNDERPIN, to prop up; underpinning the stones on which a building rests.

VALLEY, the inner angle formed by the two inclined sides of a roof.

VESTIBULE, an outer hall or lobby.

WATER-TABLES, ledges left upon stone or brick walls, at the distance of about eighteen or twenty inches from the ground, at which the thickness of the wall is diminished.

WASHER, a flat piece of iron with a hole in it, generally placed between the nut of a bolt and the surface of the wood.

WEATHER BOARDING, boards nailed upright and lapping over each other.

FORMS OF CONTRACT, ETC.

No. 1.—*Form of Agreement between Builder and Sub-Contractor for Work.*

THIS AGREEMENT, made and entered into this 22d day of August, 1887, by and between Paul Jones, of the first part, and Samuel Smith, of the second part, both of the city of Baltimore, in the State of Maryland,

Preamble.

WITNESSETH, That the said Samuel Smith agrees, and hereby binds himself, to furnish all the materials and labor necessary to execute and finish the carpentering work of a row of five two-story dwellings to be erected on the north side of Bond Street, commencing from the corner of Street, according to the drawings and specifications prepared for the said work by Thomas Brown, architect [or by the party of the first part if the builder designed his own plans], and which are signed by both parties to this

Object.

agreement and made part hereof, for and in consideration of the sum of one dollar, paid to the said Smith upon the signing of these presents, and of the sum of one hundred dollars, to be paid as hereinafter provided, for the work to be done on each of said buildings. The said Smith further agrees that the work shall be commenced at the time the said buildings have progressed sufficiently far to need said services and work, and that it shall be in strict conformity to the drawings and specifications; that he will not in any way hinder or delay the other contractors on said buildings; and that the whole job shall be pushed to completion as rapidly as practicable consistent with its being executed in a workmanlike manner, and shall be completed on or before the first day of March, 1888; and in case of failure to complete the work at that date he shall be assessed for each and every day the work is delayed through the fault of said Smith the sum of five dollars, to be retained out of any money that may be unpaid on this contract, or to be recovered by law, as liquidated damages and not as a penalty.

Consideration.

Time of commencement and completion of the work.

Liquidated damages for delay.

It is further agreed that the work shall be under the supervision and direction of Thomas Brown, architect [or builder], who shall have power to stop and reject any work or materials not in accordance with the drawings and specifications; and who shall have power, in case of failure by said Smith, to correct errors or to finish the work within the date aforesaid, or to employ other parties to finish the work, at the cost and expense of said Smith.

Supervision of architect.

It is further agreed that, if the party of the first part shall, at any time, desire any changes in either the quantity or quality of the work, they shall be acceded to and executed by said Smith without in any way violating or vitiating this contract; but the value of all such changes must be agreed upon, and indorsed upon this contract.

Extras.

It is further agreed by the party of the first part that, in consideration of the faithful performance of this contract by the party of the other part, he hereby agrees to pay the said Smith the aforesaid sum of one hundred dollars for the carpentering work on each of said buildings in the following manner: that is to say, twenty-five dollars cash as the first tier of joist is laid on each house; twenty-five dollars cash when the second tier is ready for flooring; and the balance in cash [or negotiable note, or, if the party of the second part agrees to take one of the houses in

Time for payments of consideration.

payment, or a certain percentage in cash, as estimated by the superintendent or arbitrator of the quantity of work performed, or any other understanding, it should be set forth fully].

In witness whereof, we have affixed our signatures and seals, this 22d day of August, 1887.

Witness, PAUL JONES. [Seal.]
JOHN DOE. SAMUEL SMITH. [Seal.]

[Sometimes security is required that the work will be faithfully performed, in which case the surety may be bound by making him one of the parties of the second part in the above contract, or by a special agreement.]

No. 2. — *Agreement with a Builder*[1] *for Erecting a House or other Building.*

THIS AGREEMENT, made this day of , 188 , by A B, hereinafter styled the owner, and C D, hereinafter styled the contractor, both of the city of Baltimore, in the State of Maryland, — Preamble.

WITNESSETH, That the said C D does hereby covenant, promise, and agree with the said A B that he, the said C D, shall, for the consideration hereinafter mentioned, on or before the day of , 188 , well and sufficiently erect and finish a brick and stone building upon that certain lot at the northeast corner of Market and Penn streets, in said city of Baltimore, said building to have a frontage of forty feet on Market Street and seventy feet on Penn Street, conformably to the drawings and specifications made by D F and signed by the parties and hereunto annexed, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of the said D F, to be testified by a written certificate under the hand of the said D F; and also shall and will find and provide such good, proper, and sufficient materials, of all kinds whatsoever, as shall be proper and sufficient for completing and finishing all the foundations, walls, ceilings, floors, roofings, and other works of said building mentioned in the plans and specifications, for the sum of seventy-five thousand dollars ($75,000). Object. Reference to specifications. Consideration.

[1] Carey's Forms, 293, citing Abbot *v.* Gatch, 13 Md. 314; Andre *v.* Bodman, 13 Md. 241; Eichelberger *v.* Miller, 20 Md. 332.

And the said A B does hereby promise and agree with and to the said C D that he, the said A B, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said C D as specified, well and truly pay or cause to be paid unto the said C D the sum of seventy-five thousand dollars in the following manner: $15,000 when the masons' work is completed; $20,000 when all the plaster-work has been done; $10,000 when all the windows are in; and the balance of $30,000 upon the expiration of thirty days after the completion and acceptance of said building. *Provided*, that in each of the said cases a certificate be obtained and signed by the said D F, architect, that the work, upon completion of which said payments are respectively to be made as aforesaid, has been done in a good, workmanlike, and substantial manner, and in accordance and compliance with this contract and said drawings and specifications.

Time and manner of making payments.

Certificate of architect made prerequisite.

And it is hereby further agreed by and between the said parties: —

First. The specifications and drawings are intended to coöperate, so that any work exhibited in the drawings and not mentioned in the specifications, or *vice versa*, is to be executed the same as if it were mentioned in the specifications, and set forth in the drawings to be the true meaning and intention of the said drawings and specifications.

Specifications and drawings made part of the contract.

Second. The contractor, at his own proper costs and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models, and cartage of every description, for the due performance of the several erections.

Builder to provide materials, etc.

Third. Should the owner, at any time during the progress of said building, request any alterations, deviations, additions, or omissions to or from the said contract, specifications, or plans, he shall be at liberty to have such changes made, and the same shall in no way affect or make void the contract, but the costs of such changes will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.[1]

Extra alterations and additions.

Fourth. Should the contractor, at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen (after three days' notice in writing

Owner to finish the work if contractor

[1] It is often well to provide that extras shall not be added unless agreed to in writing. See *ante*, Ch. VII.

refuse to proceed after notice.[1] being given), to finish the said works, and the expense will be deducted from the said contract price.

Fifth. Disputes to be settled by arbitration.[1] Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by R B, also an architect, and his decision shall be final and conclusive; but, should any dispute arise respecting the true value of the extra work, or work omitted, the same shall be valued by two competent persons, one employed by the owner and the other by the contractor; and in case they cannot agree, these two shall have power to name an umpire, whose decision shall be binding on all parties.

Sixth. Owner not liable for damages to uncompleted building. The owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written. Conclusion.

Attest, A B. [Seal.]
S. T. C D. [Seal.]

No. 3. — *Form of Contract between Builders and Committee or Trustees for Building a Church.*[2]

THIS AGREEMENT, made this day of between A and B, of , builders, hereinafter called the contractors, of the one part, and X, Y, and Z, hereinafter called the committee, of the other part, — Preamble.

WITNESSETH, That, for the consideration hereinafter stated, the said A and B, for themselves, their executors and administrators, covenant and agree with the committee, their executors and administrators, as follows: —

1. *General Provision.* Consideration. The contractors will build and complete, within months from the time when they are put in possession of the ground, for the sum of $, a church at K, in the county of M, according to the plans and specification, and

[1] See notes on arbitration clause, §§ 8, 47 *et seq.*

[2] From Beckett's Building, pp. 37 *et seq.*

directions from time to time of P, the architect, or such other architect as may from time to time be employed by the committee, including all things which, in the opinion of the architect, may fairly be inferred from such plans and specification to be intended without being actually specified.

Architect to interpret meaning of plans, etc.

2. *As to Alterations and Extras.* The contractors shall also execute all such alterations and additional works as shall be ordered by the architect with the consent of the committee or by the committee; but if the contractors shall be of opinion that any such alteration or addition will cause additional expense, they shall not be bound to execute the same without an order in writing from the committee, stating the price which is either agreed on or certified by the architect as the proper sum to be allowed for the same, after giving credit for the value of any omissions which have been ordered; and such order shall state also the extension of time, if any, which is to be granted by reason thereof; and neither the contractors, nor any sub-contractor under them, shall be entitled to receive from the committee, or any member thereof, any more than the sum of $, together with the amount of the sums contained in all such orders as last aforesaid; nor shall this clause be held to have been waived in consequence of anything to be done by the committee, except by an express waiver in writing, and then only as to the particular things included therein. The contractors shall, if required for the valuation of extras, produce the bill of quantities, with the prices thereto attached, on which their tender was based.

Extras to be ordered in writing.

Extension of time for extras.

Waiver to be in writing.

Bills of quantities if required.

3. *The Architect's Powers.* The contractors shall follow the directions of the architect in all respects, and of the clerk of the works in his absence, subject to the last preceding clause; but neither of them shall be considered for any purpose the agent of the committee, nor have any power to act contrary to their directions. And the whole of the work shall be done to the satisfaction of the architect. But the passing or certifying of any work by the clerk of the works [generally called the superintendent in the United States], or by the architect himself, shall not exempt the contractors from liability to replace the same, if it be afterwards discovered to have been done ill, or not according to the plan and specification, either in execution or materials.

Architect to supervise the work, but not to act as owner's agent.

Certifying the work.

4. *Correcting Faulty Work.* If anything shall be discovered to

have been done in an inferior way, or contrary to the specification or plan, and especially (but without prejudice to any other questions) if any masonry or woodwork shrinks, cracks, or opens in the joints, either before the work is certified to be complete, or within a year afterwards, the contractors shall make good the same, not by patching, but by substituting new work, which shall be subject to the same condition; and if any payments are still due to the contractors they shall be suspended until such defective work has been made good to the satisfaction of the architect, and subject to this same condition.

Defective work to be remedied.

Payments may be withheld.

5. *Payments During Progress of the Work.* Payment shall be made to the contractors at the rate of $ for every worth of work certified by the architect to have been done, or of materials delivered on the ground; and all materials shall become the property of the committee as soon as they are delivered, subject to the right of the contractors to remove all surplus materials when the work is finished.

Time and manner of making payments on architect's certificate.

6. *Provision as to Closing Payments.* When the amount so kept back has reached the one tenth part of the whole amount of the contract, the contractors shall be paid ninety per cent. on each further sum certified by the architect to be due. And all such payments of instalments shall be made within three weeks after the architect's certificate has been received, unless the committee dispute the propriety thereof. And half the balance remaining due shall be paid in three months after the architect's final certificate that the work has been completed according to the contract, and the building has been delivered to the committee; and the other half in six months, unless some defect has been meanwhile discovered as aforesaid, or the committee *bonâ fide* dispute their liability to pay on some other ground.

Final payments in three months and six months after final certificate.

7. *Penalty for Delaying the Work.* The balance due to the contractors shall be diminished by $ for every day that the work is not completed after the time hereinbefore fixed for the completion thereof. But the architect shall have power to extend the time for any good cause, such as strikes of workmen or bad weather, or additions or alterations ordered by the committee, such extension to be certified by him to the committee at the time when such cause arises, or as soon as it has ceased.

Provision for extension of time in certain events.

8. *As to Insolvency of Contractor.* If the contractors, or either of them, become bankrupt, or assign their property for the benefit of creditors, or become otherwise unable to carry on the work, or neg-

lect to do so at any time for a fortnight in the manner required by the architect, or refuse to follow his directions as to the mode of doing the work, the committee may at once terminate the contract; and thereupon all claim of the contractors or contractor so acting, his executors, administrators, and assigns, shall cease, and the committee may employ other persons to complete the work, as they think fit; and in that case no scaffolding, or fixed tackle of any kind, belonging to such contractor, shall be removed so long as the same is wanted for the work. But if any balance on the amount of this contract remains after completion, in respect of work done during the time of the defaulting contractors or contractor, the same shall belong to the persons legally representing them or him, but the committee shall not be liable or accountable to them in any way for the manner in which they may have got the work completed.

Committee may employ other contractor, when.

9. *Serving Notices.* All notices or orders for the committee or the architect may be either given or sent to or left for the contractors or either of them by post, at the works, or at their usual place of residence or business. And every person employed on the work by the contractors, whether by a sub-contract or otherwise, shall be considered their agent or servant. And any order or notice signed by the secretary or other person on behalf of the committee shall be treated by the contractors as the order or notice of the committee, until the same is revoked or corrected.

10. *Conduct of the Workmen, etc., on the Premises.* It is to be understood that the contractors and workmen are only admitted to the ground for the purpose of building, and have no tenancy thereof; and any workmen misconducting themselves, or found to be doing their work improperly, may be discharged and removed if necessary, by the committee, or architect, or superintendent.

11. *Damages Incurred while Building.* The contractors shall be answerable for all damage to the building during construction, and until the same has been certified by the architect as complete, and shall keep it insured to an amount equal to the value of the work done from time to time [and, in case of additions to an old building, shall also be answerable for all injury to the existing building from any cause which might have been prevented by them or their employees], and shall deliver up the building to the committee in perfect repair, clean and in good condition, when complete.

Committee not liable for damages to uncompleted building.

Conclusion. In witness whereof, the parties hereto have set their hands and seals the day and date first above written.

No. 4. — *Form of a Contract under Seal between a Corporation, or other Public Body, and a Builder for erecting a Building.*[1]

THIS AGREEMENT, made this day of between A B, contractor and builder, of the one part, and the Corporation, organized under the laws of the State of , of the other part, —

Preamble.

WITNESSETH, That whereas the said corporation are desirous that a building should be erected on the piece of ground situate , etc., and have caused to be prepared plans, drawings, elevations, and sections of the said building, etc., and a specification of the work for the erection of the same by C D, their architect, and the said plans, drawings, elevations, sections, and specification have respectively been approved of and signed by him and the contractors, and are annexed by way of schedule to this agreement.

Object.

And whereas the contractors are willing to undertake the execution of the said works for the sum of $, and subject to the covenants and conditions herein contained:

Consideration.

Therefore, in consideration of the premises, the contractor agrees with the said corporation, and the said corporation hereby covenant with the contractor, as follows: —

1. The contractor will, at his own proper costs and charges, forthwith begin, and in an expeditious and workmanlike manner erect, build, and finish, the said building for the said sum of $, agreeably to the said elevations, plans, drawings, sections, and specification aforesaid, and under the direction, and to the satisfaction, of the said C D, or other architect for the time being of the said corporation, and in accordance with such explanations and directions as the said architect shall from time to time give for the purposes of the work on or before the day of .

Work to be done according to the plans, and to satisfaction of the architect.

2. The contractor will find, furnish, and provide at his own expense all materials incident or necessary for so building the same, all the said materials being the best of their several kinds, and to be approved of by the said architect of the works for the time being of the said corporation;

Builder to furnish best work and materials.

[1] Emden's Precedents of Building Contracts.

and also will provide at the like expense all proper scaffolding, timber, and plant for the said work, and erect and keep a proper bound or fence round the same, of the height of feet or more, during the whole progress, and until the said buildings and work shall be complete.

Approval of architect.

Fence around the works.

3. If the corporation shall at any time or times hereafter think proper to direct any alterations or deviations to be made in the form, or quantities, or elevation, or plan of the said building, or other the work hereinbefore agreed to be done, before the same shall be performed, the corporation shall give written instructions under seal for such alterations or deviations, and the same shall not in any wise make void, impeach, or prejudice these presents or the said contract. But then, and so often, and in every such case, the contractors shall attend to and pursue the said directions as they shall in that behalf receive from the corporation, and execute and perform the same in a proper and workmanlike manner; and in every such case it shall be referred to the said architect for the time being of the said works to consider, and by some writing under his hand to determine, how far such alterations or deviations will, on the whole, be a saving or additional expense to the contractors; and if the same shall appear to be a saving, the amount thereof shall be abated out of the last instalment or payment of the said sum of $ agreed to be paid for the said work as herein provided; but if the same shall occasion an additional expense, then the amount thereof shall be ascertained by the said architect, and be paid to the said contractor by the corporation over and above the said sum, in the same manner and at the same time as hereinafter is expressed for the payment of the ultimate balance of the said sum of $; but the contractor shall not be considered to have authority for any such alteration or deviation, or the right to make any claim for the value or otherwise in respect hereof, without such written instructions so under seal as aforesaid.

Extras, alterations, and additions to be agreed to in writing.

Architect to ascertain amount due for extras, etc.

Architects' powers restricted.

4. If any of the materials hereinbefore agreed to be provided or employed by the contractor, in or about the works of the said intended building, shall be found by the said architect of the said works for the time being to be unsound, defective, or of bad quality, then, and in every such case, and notwithstanding a certificate may have been previously given by the architect for the time being, all such materials shall be forthwith removed by and at the expense of the contractor, and other

Defective materials to be removed by architect's order.

materials of a better and good and fit quality and kind in all respects, and approved of by the said architect for the time being, shall be immediately provided and made use of in the place and stead of such as shall be deemed bad or defective.

5. If any part of the said building or work shall be found by the said architect to be defective in point of workmanship, disposition of the materials, or otherwise howsoever, during the progress or after the performance of the same, then, and in every such case, and notwithstanding that a certificate may have been previously given by the architect for the time being, such defective work shall be forthwith pulled down and demolished at the expense of the contractors, and immediately thereafter rebuilt in a more complete and a proper and workmanlike manner, in all respects to the satisfaction of the said architect of the said works for the time being.

Defective work to be rebuilt.

6. If the contractor shall not, after days' notice given to him or his foreman by the said architect of the said works for the time being of such unsound material or materials deemed improper, remove the same, it shall be lawful for the said architect to cause the same to be removed to such place as he may think proper, without any liability on his part, or on the part of the corporation, for any loss or damage which may happen to the said materials so removed as aforesaid, and to cause proper materials to be substituted in lieu of the materials which shall be so objected to as aforesaid; or, in case of any part of the said works being improperly executed as aforesaid, to cause the same to be demolished and reërected by such workmen as he shall think fit: and in either of the said cases, the contractor shall and will pay all such costs, charges, and expenses as shall be incurred in the removal of such materials as aforesaid, and in the substitution of such materials in lieu thereof, or in the demolition and reërection of all such parts of the said works as aforesaid, or the same shall be deducted from the balance which shall remain of the said sum of $ as liquidated damages.

Architect may have defective work, etc., removed after notice to contractor.

Liquidated damages.

7. The contractor shall, upon the completion of the said building and works, remove and carry off all the scaffolding, board, and fencing erected for performing the same, and leave the whole of the said works in a perfect and proper state and condition.

Removal of rubbish.

8. The contractor will, during the whole time of building, and until the completion of the said intended building and works, give

due personal attendance in the execution thereof, in order that the same be carried on, executed, and performed in a proper manner in every respect, and shall not employ any sub-contractor for the execution of the same, or any part thereof, without the previous authority in writing of the corporation.

Contractor to give personal attention to the work.

9. The whole of the said intended building and works shall be completely finished and fit for use and occupation on or before the said day of now next ensuing; and if it shall happen that the said intended building and works shall not be completed and finished fit for use and occupation within the time aforesaid, the contractor shall and will forfeit and pay unto the said corporation the sum of $ per week, as and for ascertained and liquidated damages and not by way of penalty, for every week from and after the said day of until the same shall be so finished and completed; which sums shall or may be retained and deducted out of so much of the said sum of $ as for the time being shall remain unpaid, or be recovered and recoverable from the contractor by the said corporation by action or otherwise.

Time of completion.

Liquidated damages for failure.

10. The said corporation shall and will, if the contractor duly execute and perform all and every the covenants and agreements on his part to be observed, done, and performed, according to the true intent and meaning of these presents, pay or cause to be paid to the said contractor the said sum of $ for completing and building the said intended building and works aforesaid in several instalments, at the times and in the manner following: that is to say, the first instalment or sum when the brick-work of the said building shall be carried up level with the one-pair floor; the second instalment when [*state particular period, and other instalments*]; the third instalment or sum when the roof of the said building shall be completely covered in; and which said instalments or sums it is hereby agreed shall respectively be of an amount equal to [three fourth] parts of the value of the works which at the said respective times or periods shall have been performed, as certified in writing under the hand of the architect for the time being of the said corporation; and the fourth or last instalment or sum (in completion of the said sum of $), and also such further or other sum as may have been occasioned by any such alterations or deviations from the original or present plan of the said buildings or works as afore-

Time and manner of making payments.

Instalments.

Final payments.

said, within (three) calendar months next after the said buildings and works shall be wholly completed and perfected according to the tenor and true intent and meaning of these presents. But no payments as aforesaid shall be made to the contractor except on the certificate in writing of the architect for the time being of the said corporation that the said works have been satisfactorily completed at the said respective periods.

Certificate of completion necessary.

11. If damage by storm, tempest, accidental fire, or other inevitable accident, shall happen to the said works, which it shall not be in the power of the said contractor to prevent, the same shall be made good and repaired at the expense of the said corporation; but if such damages shall have happened or be occasioned by or through any neglect or default of the said contractor in any wise, then the same shall be immediately repaired and made good at his own proper cause and expense.

Damages during progress of work.

12. Notwithstanding any certificate that may have been given by the said architect for the time being, if any bad work or defect, contrary to the terms of this agreement, shall be discovered within after the completion of the said works, no further payment, if any due, shall be made to the contractor; and the contractor shall make good all such defective or bad work, in accordance with the stipulations herein contained, within days after notice in writing from the corporation, or in default the corporation may do so, and the cost and expense incurred in either case shall be paid by and be recoverable from the contractor. [Here add, if deemed advisable, conditions as to foreman, authority, general superintendence, delays caused by strikes, inclement weather, and property in materials, arbitration, etc.]

Defects discovered after completion of the work.

In witness whereof the said A B has hereunto, etc.

No. 5. — *Form of Agreement for Specified Repairs and Improvements.*

This Article of Agreement between X Y, of the first part, and A B, of the second part, Witnesseth, That the said X Y, carpenter and builder, does agree to put certain improvements upon house No. Street, viz.: to tear down back building, dig cellar clear away all rubbish and dirt; to dig to the depth of main cellar according to plan submitted and specifications signed; underpin wall on the southeast side if requested to, or agreeable to the owner, and necessary for the protection of his wall, and to build a four-inch wall

against it with mortar and cement to the proper height. It is further agreed that said X Y may use all the old materials as far as suitable, and furnish all others required to erect a three-story brick building, embracing a dining-room 16×21 feet; a pantry 7×9 feet; back stairway 2×6 feet clear, from cellar to third story; a kitchen of 14×13 feet in the clear, according to plan given and agreed upon; all the walls to be nine inches to top; a porch over the kitchen end 6×13 feet, with a railing, and covered with a tin roof; hot and cold water pipes and permanent wash-tubs in the kitchen; also sink for water in pantry, furnished with shelving, drawers, and dumb waiter; bath-room complete, with a water-closet of approved pattern, hot and cold water pipes, and tub; all joist and flooring to be of proper strength and quality for a good job; covering the whole back building with the best quality of tin roofing and spouting complete; plastering every room with two coats of brown and one coat of white stuff in the best manner; putting centre-pieces in the dining-room and library; paint all wood-work in a suitable manner, and color and grain the dining-room, also parlor doors and shutters; put up a neat slate mantel in dining-room and library; continue the front stairway up without platform so as to make level floor without break; front and back floors to be level with main floors; sliding doors with ground-glass panels, from parlor to dining-room; inside shutters in all front windows, the first-story ones panelled, and hung in boxes of ash, second and third stories to casings, painted, and secured by proper fastenings; all windows, doors, and shutters of proper size and quality; *finally*, build and complete for occupation in the best manner a back building according to plans, in as short a time as possible to make a good job; repair pavements and fences; the party of the second part agreeing to make payments as the progress of the work will warrant, leaving one fourth not to be paid until completion of the entire job. The consideration of this contract to be sixteen hundred dollars, and no extra charges whatever, unless agreed to in writing and attached hereto.

Witness the hands and seals of

X Y, *Builder.*
A B, *Owner.*

said, within (three) calendar months next
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Certificate of completion necessary.

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Damages during progress of work.

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No. 5. — *Form of Ag*

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superintendent is to have access to the building
to have control of the work, and may Access to building: improper workmen.
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k incompetent or improper to be em-

‹tor to complete the whole of the works within
ıı the commencement, unless the work be Time for completion.
›n of inclement weather or causes not under

[1] See Kelly *v.* Kellogg, 77 Ill. 477.

No. 6. — *Letting out Contracts.*

NOTICE FOR BIDS. — To builders and others: Persons willing to contract for the erection of a at , in the county of , may inspect the drawings and specifications at from the day of until the day of next ensuing. Offers will not be received later than o'clock on the last-mentioned date. The advertisers do not bind themselves to take the lowest offer; nor will any be accepted unless the character, means, and sureties of the persons offering be satisfactory, and the amount of the offer within [a certain sum]. All further particulars or explanations will be given by the architect at his office.

[Signed,]

No. 7. — *Forms and Effect of Special Provisions and Conditions frequently used in Building Contracts.*

1. Building contracts containing the following provisions have been generally upheld to defeat actions for *extra work* not agreed upon in writing: [1] —

Agreement in writing made a condition precedent to extras.

"And it is mutually agreed that, should any alteration be contemplated from the present design, it may be done, *provided* the parties beforehand agree upon the price and indorse it upon this contract, and unless such agreement be so entered it is to be taken for an agreement to make the alteration without any change of price from the original contract." [2]

"No extra charges to be made unless a written agreement be made and attached to this contract." Held to hold against subsequent verbal orders for extra work.[3]

2. The condition of the bond to be executed by the *sureties* is generally worded thus: —

Surety.

"Whereas X and Y have contracted with A, B, and C to build a house for the sum of $ by a contract dated the day of : Now the condition of this obligation is that, if the

[1] See Baltimore Cemetery Co. *v.* Coburn, 7 Md. 202; Trustees *v.* Platt, 5 Brad. 567.

[2] Franklin *v.* Darke, 3 Foster & Finlason, 65; Russell *v.* Bandiera, 32 L. J. N. S. C. P. 68; 3 Ellis & Ellis, 306.

[3] Abbot *v.* Gatch, 13 Md. 314. But see Mowbry *v.* Starbuck, 4 Cal. 274; McFadden *v.* O'Donald, 18 Cal. 160; Kalkman *v.* Baylis, 17 Cal. 291; Clark *v.* Pope, 70 Ill. 128.

said X and Y shall duly perform the said contract, this obligation shall be void, but otherwise the same shall be and remain in full force and effect." [1]

Other conditions: —

3. The building to be constructed in the best and most workmanlike manner, and in accordance with the true and reasonable intent of the plans, drawings, and specifications taken together; in case of any discrepancy between the drawings and specifications, the architect is to decide which is to be followed.

Work to be done in proper manner.

Architect to interpret the plans, etc.

4. Should any work be, in the opinion of the architect, executed with improper materials or workmanship, the contractor agrees, when required by the architect, to pull down and rebuild the same, and to substitute proper materials and work; and in case of default of the contractor within a reasonable time, the architect is to have full power to employ other persons to rebuild the work, and the cost thereof to be charged against the contractor.

Defective work or materials to be pulled down.

5. Any defects or other faults which may appear within months from the completion of the building are, upon the direction of the architect, to be amended and made good by the contractor at his own cost; and in case of default, any cost incurred by the employer in so making good may be recovered by the employer from the contractor, the amount thereof, in case of dispute, to be settled as provided hereafter.

Defects appearing after completion.

6. The contractor is to insure the building against loss or damage by fire, in the office of some company approved by all the parties, and the building is to be under the contractor's charge, the said contractor being responsible for, and shall make good, all damages occasioned by fire or otherwise to the building over which he shall have control.

Builder to insure.

7. The architect or superintendent is to have access to the building at all times, and he is to have control of the work, and may require the contractor to dismiss any workman or workmen whom he may think incompetent or improper to be employed.

Access to building: improper workmen.

8. The contractor to complete the whole of the works within months from the commencement, unless the work be delayed by reason of inclement weather or causes not under

Time for completion.

[1] See Kelly *v.* Kellogg, 77 Ill. 477.

his control. In case of default, the contractor to pay or allow the proprietor, as by way of liquidated damages, the sum of $ per day for every day the completion of the building is delayed.

Liquidated damages for delay.

9. All work and materials intended to form part of the building are to be considered the property of the proprietor, and are not to be removed without consent of the architect.

Property in materials.

10. Any difference that may arise between the proprietor or the architect and the contractor as to any additions made, or as to the meaning of the signed drawing and specification, or any other matter or thing arising out of this contract, except as hereinbefore described, is to be referred to the arbitration and final decision of the architect in charge [or to some other architect, or to certain builders or others, as agreed.][1]

Arbitration clause.

11. If the contractor shall become bankrupt, or make an assignment for the benefit of his creditors, or shall die, or shall delay the performance of his part of the contract from any cause whatever, the architect or proprietor, or his agent may give to the contractor, or his assignee or representative, notice requiring the work to be proceeded with; and in default it shall be lawful for the proprietor or his architect to enter upon and take possession of the building, and to employ any other person or persons to carry on and complete the same. The costs and charges incurred in the said completion are to be paid to the proprietor by the contractor, or may be set off against money due or to become due to the contractor.

Insolvency of contractor.

No. 8. — *Forms for Special Sub-Contract Stipulations.*

1. *As to the Work generally.* The said C D, sub-contractor, will, within the time stipulated in the original contract made with X Y by A B, faithfully execute the [bricklayers', carpenters', or plumbers' work, as the case may be], and will provide all materials for the same, and will complete the entire job in all respects in accordance with the plans and specifications annexed hereto, and signed by the said C D, sub-contractor.

2. *As to Damages.* The said C D, sub-contractor, will save harmless and keep indemnified the said A B, contractor, from all loss, costs, damages, claims, demands, or expenses of any kind whatsoever which may be sustained by the said A B, contractor, by reason

[1] See objections to arbitration clauses, *ante*, §§ 47–53.

of any delay or default, or any breach of this contract, on the part of the said C D, sub-contractor.

3. *As to Defaults.* If the said C D, sub-contractor, shall not proceed with the said work in accordance with this agreement, and to the satisfaction of the architect or surveyor for the time being of the said [*employer*], of which delay or default the said architect or surveyor is to be the sole judge, it shall be lawful for the said A B, contractor, upon such delay or default, to employ such other contractor or workmen, and to supply all such materials as may be necessary in order to complete the said work in accordance with the said original agreement, and to deduct the costs, and all other expenses in any way caused by such delay or default, from the amount (if any) which shall be payable to the said C D, sub-contractor, by virtue of this agreement; and in the event of that amount being insufficient, the said C D, sub-contractor, will pay to the said A B, contractor, any deficiency, and all costs and expenses attending the recovery of the same by action or otherwise.

4. *As to Price.* The said A B, contractor, will, in consideration of this agreement, pay to the said C D, sub-contractor, the sum of $ when the architect or surveyor for the time being of the said [*employer*] shall have certified in writing that the said work has been finished and completed to his satisfaction [*or stipulate payment by instalments, if desired*].

5. *As to Extras.* No extra work shall be charged to or paid for by the said A B, contractor, except such extra work as may be ordered by the said A B, contractor, in writing; but such order shall not operate so as to extend the time beyond the day of to be allowed as aforesaid for the completion of the work.

6. *As to Penalty for Delay.*[1] The said C D, sub-contractor, shall pay to the said A B, contractor, the sum of $, as liquidated and ascertained damages, and not by way of penalty, per day, for each day after the day of that the said work shall not be finished or completed, until completion as aforesaid; and it shall be lawful for the said A B, contractor, to retain the said sums out of moneys payable to the said C D, sub-contractor.

[1] It is important to note the legal distinction between penalties and liquidated damages. See §§ 58, 59.

No. 9. — *Form of Specification for the Construction of a Church or other Building in conformity to Drawings attached.*

1. *As to Notices, etc.* The said A B agrees to give to the proper local authorities all requisite notices; to obtain all necessary licenses for temporary obstructions, inclosures, openings into sewers, tappings of gas and water pipes, etc.; to pay all proper fees for the same; to make good any damages occasioned to adjoining premises; to have proper notices posted by day, and lights at night to prevent accidents: and to construct all inclosures and fences proper for the protection and convenience of the public.

2. *As to Old Buildings.* The said A B agrees to carefully take down the old buildings, and entirely remove the old materials, rubbish, etc., to the satisfaction of the owner and all others interested: that the old materials shall become the property of the said A B. who shall be allowed to use any portion of the same suitable and proper for the new building, subject to the approval of the architect or superintendent.

3. *As to Excavating Cellars, etc.* The said A B agrees to clear away all rock, soil, or rubbish necessary to leave the site of the structure unincumbered; and excavate for basement, areas, walls. cesspools, drains, tanks, and vaults, as shown by the drawings: to properly refill, ram down, and level as required; and remove all superfluous matter excavated, to the satisfaction of all the parties. The cellars to be excavated the depth of feet.

4. *As to Underpinning.* The said A B agrees to take every necessary precaution; to prevent damages of every character; to carefully underpin all walls, partitions, or buildings surrounding the site of the proposed building in any way endangered by excavations or otherwise.

5. *As to Drains, etc.* The said A B agrees to bail out, pump away, or remove all water and soil which may come into the foundations from springs, currents, rains, cesspools, or otherwise; and effectually complete the drainage of the excavations and footings before any masonry or brick-work be done.

6. *As to Digging a Well.* The said A B agrees to dig a well in the situation marked on plan, four feet diameter and fifty feet deep below the level of the surface soil, if such depth shall be deemed necessary by the superintendent or architect for the purposes of said well. The said well to be bricked up according to most approved methods.

7. *As to Trenches for Footings.* The said A B agrees to make perfectly level and hard the bed of all trenches for footings; and consolidate the earth about the same, and against all walls, drains, pits, etc. The depth of the footings to be contracted for as shown by the drawings. Should a less depth be admissible, or a greater depth be required, the deviation will be made under the written permission of the superintendent or architect.

Many other stipulations are usually added, referring to the special manner of performing the work called for in the design, such as concreting foundation, piling and planking, artificial ground-making, indents of bricks, hollows, pointing, arches, facings, cuttings, fireplaces, chimneys and stacks, tiles, grates, masonry, brick-nogging, yards, clinker pavements, vaultings, cesspools, outlets, drains, water-tanks, ventilation, plumbing, rubble masonry, mortar, footings, copings, steps and stairbuilding, quantities and qualities of materials, window and sash frames, doors, entablature impost, terra-cotta work, balconies, in fact all that concerns the proposed building, and the manner of carrying out the designs agreed upon between the parties.

No. 10. — *Form of Notice to Contractors to proceed with Work.*[1]

WHEREAS, by an agreement dated the day of , 18 , made between (therein and hereinafter designated as the said contractors), of the one part, and the (therein and hereinafter designated as the said employer), of the other part, for the consideration therein appearing, the said contractors covenanted and agreed with the said employer to execute the works required for constructing and completing, etc. [*describe work*], as the same were set forth and described in the specification, bill of quantities, schedule of prices, and plans in the said agreement referred to; and covenanted and agreed to observe and perform all the covenants and provisions set out in such specification, and that all the powers, rights, and privileges mentioned therein, and conferred thereby, in respect of such work, should and might be exercised according to the true intent and meaning thereof: and whereas, by the said agreement, it was provided that, if the said contractors should not complete the said works within the period limited for that purpose, or if, from any cause whatever (not arising from any act or acts done, or omitted to be done, by the said employer contrary to

Preamble.

Reviewing the stipulations of the contract.

[1] Held sufficient in Walker *v.* London & N. W. Ry. Co. L. R. 1 C. P. D. 528.

the true intent of the said agreement), they should be prevented from or delayed in proceeding with the completion of the said works according to the said specification, it should be lawful for the said employer, without any previous notice being given to the said contractors, to take the said works entirely or in part out of their hands, and to employ any other contractor or contractors, workman or workmen, either by contract or by measure or value, or otherwise, to proceed with the said works and complete the same; and that in such case the said contractors should only be entitled to receive such sums as shall have actually accrued due at the time of the works being taken out of their hands, and all expenses incurred by so doing shall be deducted and retained from the money due to the original contractors, or shall be recoverable as liquidated damages by action at law or otherwise: and whereas, by the said specification, it was also agreed that, should the engineer be at the time dissatisfied with the nature or mode of proceeding with or at the rate of progress or maintenance of the works, or any part thereof, he shall have full power to procure and make use of all the labor and materials which he may deem necessary, deducting the cost of such labor and materials from the money that may be then due, or that may become due, to the contractors; but it was expressly declared that the possession of this power by the engineer should not in any degree relieve the contractors from their obligation to proceed in the execution of and to complete the works with the requisite expedition, or to maintain them as thereinafter mentioned, and it was provided that, should the contractors fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as thereinafter mentioned to the satisfaction of the engineer, the contract should, at the option of the employer, but not otherwise, be considered void as far as relates to the works remaining to be done, and all sums of money that might be due to the contractors, together with all materials and implements in their possession, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the employer, and the amount should be considered as ascertained damages for breach of contract: and whereas the said contractors have not completed the said works within the period limited for that purpose, and have not been prevented or delayed from proceeding with the completion of the said works according to the said specification by any act or acts done or omitted to be done by the said employer, but great delay has occurred in the completion of the same: and whereas the engineer

Failure.

mentioned in the said specification is dissatisfied with the nature or mode of proceeding with and at the rate of progress of the works, and the contractors have failed to proceed in the execution of the works in the manner and at the rate of progress required by the said engineer: Now the said , employer, doth hereby give the said , contractors, and each of you, notice that he will, at the expiration of one week from the date hereof, take the said works entirely out of your hands, and will, if need be, employ other contractors, workmen, etc., to proceed with the works and complete the same, and also that the said engineer on their behalf will procure and make use of such labor and materials as he may deem necessary, deducting the cost thereof as in the agreement provided. And the said employer gives you further notice that the said contract shall be considered void as far as relates to the works remaining to be done, and that the sums of money, materials, implements, and penalties hereinbefore mentioned shall be and hereby are forfeited to the said employer. [Signed,]

Notice.

N. B. — The above form is too lengthy and formal for ordinary practice of giving notice to proceed, unless the object be to so confuse the contractor, by judicially declared sufficient phraseology, that he will not understand the real object of the notice. I believe the following will be found much more convenient in general practice: —

Mr. A B, Builder:

Sir, — I hereby notify you to proceed at once, in a workmanlike manner, with the erection and completion of the buildings you have undertaken, and that you diligently and properly execute all the conditions and stipulations of the contract entered into by you with me on the day of , 18 [*here describe the location, etc., of the buildings*]. I further notify you that, should you neglect or refuse to proceed with the work of construction within days after service of this notice, I will take possession of the uncompleted buildings, and employ other builders or workmen, and purchase such materials as may be deemed advisable to complete the said work at your risk and expense, or dispose of the unfinished work by sale if I am so disposed. You are also notified that I will take whatever legal proceedings I may find advisable to aid the completion of the buildings in accordance with our contract dated the day of , 18 , and that payment of all instalments to you will cease from this day unless you diligently and forthwith proceed with the work.

X Y, *Owner.*

No. 11. — *Declaration to Recover against a Builder for Defective Work.*[1]

[Titling, etc.]

That on the day of , 188 , the plaintiff and defendant signed an agreement [*here recite the terms of the agreement*]; that the plaintiff duly fulfilled all the conditions thereof on his part; that the defendant constructed said building in so unskilful and negligent a manner (and of so unsuitable materials) that shortly after its completion the foundation settled, the walls cracked, the roof and walls became leaky, a considerable portion of the plastering fell, and the house otherwise was and is entirely untenantable and nearly useless, through the negligent and unskilful manner of its construction.

And the plaintiff claims $ damages.

No. 12. — *Declaration to Recover against a Builder for not Completing his Work, with Special Damage for Loss of Rent.*[2]

That on the day of the plaintiff and the defendant signed an agreement whereby the defendant agreed to erect in a substantial manner a two-story frame house in Cambridge, Md., and to have it completed and ready for occupancy on or before the day of , 188 , for which the plaintiff agreed to pay him $2,000, payable as follows: When the foundations should be laid, $500; when the first story should be up and the second tier of beams laid, $300; when the second story should be up and the third tier of beams laid, $300; when the roof should be on, $400; and when the house should be entirely finished the balance, or $500.

That the plaintiff duly performed all the conditions thereof on his part; that the defendant entered upon the performance of the work under said contract and laid the foundations of the said house, and commenced to erect the first story thereof, but has neglected to finish the said building pursuant to said contract, and has left the same with the foundations laid and the walls of the first story partly up, and, although the time for the completion of the building has expired, he refuses to complete the same; that the plaintiff, on the day of , 188 , made an agreement with J S, whereby he agreed to let, and the said J S agreed to hire, said building for one year from the day of , at the yearly rent of $, of which

[1] Carey's Forms, 98. [2] Ibid. 99.

the defendant had due notice; that, by reason of the defendant's failure to complete the contract upon his part, the plaintiff has been unable to complete said house so as to give to J. S. the occupancy thereof, and has been thereby deprived of the profits of said lease, and has been otherwise injured.

And the plaintiff claims $ damages.

No. 13. — *Contract for Erecting a Public Building.*[1]

THESE ARTICLES OF AGREEMENT, made and entered into this day of , 1887, by and between the Board of Police Commissioners for the city of Baltimore, in the State of Maryland, of the first part, and , of the same place, of the second part, WITNESSETH:

1. GENERAL OBJECT. The said party of the second part, for and in consideration of the sum hereinafter mentioned, does hereby covenant, promise, and agree to and with the said parties of the first part, *or with their successors in office*, to provide all materials, and to execute and complete for the said parties of the first part, certain works required in and for the erection of the Police Station House, on the corner of and Streets, in the city and State aforesaid, according to the general drawings, specification, and detailed drawings furnished by , architect, and hereinafter called the said architect, and agreeably to the conditions hereinafter written, as well as to such other general or detail drawings as may be furnished from time to time during the progress of the work to more fully illustrate the general drawings and specification, and subject in every particular to the instruction and approval of the said architect.

2. FIRST-CLASS WORK. It is further understood and agreed by the said party of the second part, for himself, his executors, administrators, or assigns, that all the materials shall be in strict accordance with the specification, and that the work shall be done in the best and most workmanlike manner.

3. CONTRACT NOT ASSIGNABLE. It is further understood and agreed by the said party of the second part, for himself, his executors, administrators, and assigns, that neither he nor they are to sublet or transfer this contract to any person or persons, but shall carry out its requirements under his own supervision.

[1] Mr. Frank E. Davis, architect, of Baltimore, Md., has kindly furnished the writer with this practical and comprehensive form. The specification, like that which follows (*post*, form 14), is intended to be made part of the contract, and is usually attached to it.

4. ACCESS OF PARTIES TO THE BUILDING. The said parties of the first part, the said architect, or any one he or they may deputize, shall at all times have access to the premises, the drawings and specification, and, at all reasonable times, to the business premises of the said party of the second part, to inspect the work in the progress of execution.

5. CONSIDERATION. In consideration of the said works being executed and completed by the said party of the second part, his executors, administrators, or assigns, in accordance with all the drawings furnished, and with the specification and general conditions therein written, which are in every particular to be regarded as part of this contract, and with the terms and conditions herein contained, the said parties of the first part agree to pay, or cause to be paid, to the said party of the second part, the sum of $, lawful money of the United States of America, in the following manner, viz., in instalments, to the amount of ninety per cent. of the contract price, upon certificates, which the said architect will issue at different stages of the work, for the following amounts, viz.: —

$ when the walls are ready for the joists of the first floor; $ when the joists of the second floor are laid; $ when the joists of the third floor are laid; $ when ready for the roof; $ when roofed in; $ when ready for plasterers; $ when ready for the painter; $ when finished; and the balance, $, is to be paid to the said party of the second part when the said architect gives a certificate that the works have been completed according to the drawings and specification and to his entire satisfaction, and when vouchers are produced showing that all bills have been paid for materials furnished and labor performed upon said station house, or when a release from lien or liens under the laws of the State of Maryland is furnished from all parties having claims for materials furnished or work done in the said building.

6. INSURANCE. It is further understood and agreed between the aforesaid parties that when the building is under roof the said party of the second part shall insure at his own expense, and keep the same insured, against damage by fire until acceptance by the parties of the first part; the proceeds or avails of said policy or policies of insurance, in the event of damage or destruction, to be applied or devoted to the reconstruction of the works so destroyed or damaged.

[7. Time condition if desirable.] [1]

[1] See form No. 7 for wording of this condition.

In witness whereof the parties hereunto set their hands and seals, the day and year first above written.

[Signed,]

Signed, sealed, and delivered in presence of

[SEAL.]
[SEAL.]
[SEAL.]

No. 14. — *Another Form of Specification.*[1]

Specification of the work to be done and the materials to be furnished in the erection and completion of the Police Station for the Police Commissioners of Baltimore city, according to the plans and drawings therefor, prepared by , architect.

Dated of , 1887.

General Conditions. The contractor is to provide all material (new and of the best quality, unless otherwise specified), and is to execute and complete the various works in the best and most workmanlike manner, as set forth in the following specification and its accompanying drawings; as also according to the directions, and to the entire satisfaction, of the architect. The contractor is to abide by and comply with the obvious intent and meaning of the drawings and specification, and is not to avail himself of a manifestly unintentional error or omission, should such exist; nor fail to repeat and make perfect any parts obviously so intended, though singly shown or insufficiently expressed, for the sake of brevity or needless repetition. In all cases of reasonable doubt as to the drawings he is, unless otherwise advised by the architect, to adopt figured dimensions thereon in preference to the scales or proportions thereof; but in all cases the intended true dimensions of the grounds and premises in preference to either.

Dispute as to Details. Should any dispute arise, or anything require explanation or further detail, the contractor is to apply to the architect, allowing him a reasonable time to supply the same; and is to accept as final his interpretation of the drawings and specification, and is to comply with any further details given as part of the contract.

Examination of Premises before Tender. The contractor shall be held to have examined the premises and site so as to compare them with the drawings and specification, and to have satisfied himself of their accuracy, before the delivery of his proposal, as no

[1] The author is indebted to Mr. Frank E. Davis, architect, of Baltimore, for this admirable form.

alterations will be subsequently made in his behalf in the event of any error being discovered.

COPIES OF CONTRACT, ETC. The original contract drawings and specification are to remain in possession of the architect for his future reference. The architect will provide the contractor with free copies of all the contract drawings, and the specification required for his own use: these are to be carefully mounted and preserved, and accessible at all times to the architect, or the owners, during the progress of the work, and when the building is completed they are all to be returned to the architect at the time he, the said architect, issues the certificate stating that the contractor is entitled to his last payment of money; and if lost, stolen, or destroyed, they are to be replaced at his (the contractor's) own expense; nor shall any allowance be made him for any delay that may thereby occur.

DEFECTIVE WORK. Should any of the work or materials be considered by the architect unsound or defective, the contractor shall, after twenty-four hours' written notice, remedy or remove the same, or in default thereof the architect may thereupon cause the same to be taken down or removed, as the case may require, and replaced by proper material and labor, at the expense of the contractor.

DEVIATION. The architect shall be empowered to deviate from the drawings and specification, or to make such alterations either of omission, deduction, or addition therein as he may think fit, and such alterations shall not invalidate the contract; but their value shall be decided and agreed upon between the contracting parties before the work is proceeded with, and such value being added to the contract price, or deducted therefrom, as the case may be. The contractor himself, however, shall not be empowered on any pretence, save the sanction of the architect, to deviate from the drawings and specification, or to claim for extra work, save for such as may have been ordered in writing by the architect. Detail drawings given to the contractor during the progress of the work are not to be regarded as extras to, or variations from, the original contract, but are to be considered as simply explanatory of the work already stipulated for in the said contract, unless the contractor shall, within a reasonable time after their delivery, and prior to the execution of the work, make objection in writing to such detailed drawings, and obtain from the architect a written order or memorandum, to append to such detailed drawings, recognizing any alleged extra work or material claimable thereon.

ARCHITECT TO DECIDE. The decision of the architect shall be

final and binding on all parties concerned, when given on all questions of doubt as to the tenor and intention of the drawings and specification.

BONDS. The contractor is required to execute a sufficient bond with sureties for the due performance of the works and the completion of the same inside of months from the date of the contract, and also a good and sufficient bond to protect the owners against mechanic or other lien or liens under the laws of the State of .

TEARING DOWN OLD BUILDINGS. The buildings now on the premises are to be taken down in the most careful manner, at the entire risk of the contractor, the material carefully cleaned, sorted, and stacked for re-use in the new building, when not in conflict with the provisions of this specification. The old joists, if perfectly sound and properly re-cambered, may be used for the first story of the new building, or new $3'' \times 12''$ of the best heart Georgia yellow pine.

OLD CESSPOOL. Clean out any cesspool or pit now on the premises, filling the same with clean earth, well rammed down and then covered with North River bluestone flags cemented in position.

EXCAVATIONS. Dig out to the proper depth for a cellar, 9 feet from floor to floor under the entire building; for the trenches for drain and other pipes, and for the various foundations to walls, piers, etc., sufficiently wide to receive the footings as shown on the drawings. Regrade the pavement as shown, and remove all superfluous rubbish and earth from the premises, scrubbing the floors at the completion of the building. Should it be necessary to excavate to a depth greater than required by the drawings to get a solid foundation, then such additional excavation, and consequent greater depth of wall, is to be charged for by the contractor, at prices which must be named in his bid, viz., at so much per cubic yard for excavation, and so much per cublic perch for foundation walls, all materials and labor included.

NEW CESSPOOL. Dig the cesspool ($4' 0''$ in diameter when completed) where shown, to a full and flowing stream of water in a bed of coarse sand or gravel; cover it with granite or North River flags, with a man-hole through the centre of it, and cover with $1' 6'' \times 2' 0'' \times 3''$ stone. Soil or other pipes to enter the cesspool directly under the slab covering.

FOUNDATION WALLS OR FOOTING STONES. Put in bottom course of large flat stones (bedded $16''$ below cellar floor), for footings to all walls, etc., projecting in all cases 8 inches on each side of the wall or pier built on them; at least one third of these footing stones are

to extend in one piece entirely across the trench, and under the corners and piers between the windows. [Here to follow other particulars.]

MORTAR. Bed the footing stones in mortar, composed of one part cement to two parts coarse, sharp sand, used when fresh.

GRANITE WORK. [Particulars as to stone trimmings.]

FRONT STEPS. Provide steps to front doorways as shown. All granite to be fine bush hammer dressed, jointed and set in the best manner, and firmly anchored and clamped where requisite with strong galvanized wrought iron anchors or clamps, properly set in with lead, or built into the walls.

CURBING ALLEYS AND STREETS. [Particulars.]

BRICK-WORK. Carry up all the walls, piers, stack, flues, etc., to the requisite heights, and of the thickness shown or figured on the drawings. All angles and reveals must be carried up true and plumb. Face the inside walls of the second, third, and fourth stories with well-burned bricks, and the south and east walls with the best quality of hard dark-red bricks of uniform color; face the north wall with the best sand bricks. Face the front, etc., wall with the best quality of dust-pressed bricks. Sample to be left with the owner when the bid or tender is submitted. No salmon or soft bricks are to be used in any part of the work below the first story window-sills, etc. Cesspool to be walled up with hard-burned or black bricks. All pressed bricks to be laid with a thin and perfectly cut joint, cleaned down, oiled and pencilled; lay all other face bricks with thin struck joints. Arches on the front to be formed with long arch-brick. All bricks to be hand-made.

FLUES. [Here follow full and definite particulars as to flues for hot-air pipes, ventilation, foul air, and smoke.]

MORTAR. [Here particulars as to the ingredients and quality of mortar to be used for various portions of the work.]

PAVING. [Particulars as to paving yard, alley, and street.]

VENTILATION;[1] JOISTS, BRIDGES, GIRDERS; COUNTER CEILING, ROOF; SHEATHING; WINDOW FRAMES AND SASHES, DOOR FRAMES; FLOORING, BASEBOARDS, STAIRCASES; STEP-LADDER TO LOFT; DOORS, FENCING, CORNICES; IRON WORK; VAULTS, WATER-SPOUTS; MANTELS; ELEVATOR; WATER-CLOSET; CEIL-

[1] Several items of the specification have been set forth above in order to give an idea of the attention paid to the minutest detail. Other parts of the proposed building are merely mentioned above, but it is customary in specifications to describe the requirements as to each fully and definitely.

ING; LUMBER; TIN-WORK, PLASTERERS' WORK AND MATERIALS; PAINTING AND GLAZING; PLUMBING; WASTE-PIPES AND DRAINS; GAS-PIPES; BATH TUB AND SUNDRIES; SLATE; VALLEYS; CONCRETING CELLAR; CEMENT; ANCHORS, CLAMPS; CASTING AND HARDWARE GENERALLY; STIRRUPS AND BEAMS; ROOF-CASTING, FIRE-CASTING; LIME OF TEIL; ASPHALTUM; SEWERAGE; HEATING APPARATUS; WOOD CEILINGS; DUMB WAITERS, SPEAKING TUBES, etc.

No. 15. — *Stipulations for Agreement with Architect.*[1]

1. [*architect*] will prepare sketch plans, elevations, and sections of the intended building, having regard to the proposed cost, so that a contract may be made for it, including fixtures and fittings, warming, ventilating, lighting, boundary fences, lodges, and every other work necessary to render the building fit for occupation, except furniture, for the proposed amount.

2. If [*employer*] abandon the intention of executing the building, the said [*architect*] shall be entitled to a sum to be fixed beforehand, and to the return of his sketches [but see 6 and 12].

3. If the sketches are approved, with or without modification, and the [*employer*] desires to proceed, the said [*architect*] shall, by a day named, prepare working drawings and specifications for competition by builders.

4. The drawings and specifications shall be full and complete, so as to enable the said [*employer*] to enter into a contract with a responsible builder.

5. If the most approved tender exceeds the amount proposed, the said [*architect*] shall, if required by the said [*employer*], revise his plans so as to bring the expenditure within the prescribed limit.

6. The plans and documents relating to the works shall be the property of the said [*employer*] (*i. e.* at once, not merely after the work is done), and the said [*architect*] shall make, at his own expense, all copies of them necessary for the conduct of the works.

[Provisions 7 and 8 are as to certificates and clerks.]

9. The said [*architect*] will be at liberty to vary architectural details, provided such variations do not involve extra cost, but shall on no account incur increased expenditure without sanction of the said [*employer*] in writing.

10. If any additional or substituted works become necessary dur-

[1] Beckett on Building, 26 *et seq.*

ing the execution, the said [*architect*] shall furnish the plans, etc., as soon as possible.

11. The said [*architect's*] remuneration shall be a fixed sum to be agreed on beforehand: the one third of it shall be paid to him on the execution of the contract; another third when half the contract price has been paid to the builder, and the rest when the last payment has been made to the builder.

12. If, after the working drawings have been made, the said [*employer*] does not proceed, the said [*architect*] shall be entitled to a fixed sum, to be agreed beforehand, and the plans, etc., shall belong to the said [*employer*]. Or, if the said [*employer*] proceeds only with a part of the works, the said [*architect*] shall be entitled to a proportionate part of the remuneration mentioned in [11], in addition to a proportionate part of the sum mentioned in this article in respect to the works abandoned.

13. The said [*architect*] shall be entitled to nothing more except for alterations and additions made by the written authority of the said [*employer*].

14. If the said [*architect*] dies, or becomes incapacitated, he or his representatives shall hand over to the said [*employer*] all plans and papers relating to the works, and shall be entitled to such equitable proportion of the unpaid part of said remuneration as may be agreed upon.

It may also be stipulated that "no rules of architectural societies shall be binding upon the said [*employer*]."

No. 16. — *Joint and Several Bond from a Builder and Surety.*

KNOW ALL MEN BY THESE PRESENTS, That we, A B, of, etc. [*builder*], and C D, of, etc. [*surety*], are held and firmly bound to E F, etc., in the penal sum of $, to be paid to the said E F, or to his executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves and each of us, our and each of our heirs, executors, and administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , 188 .

WHEREAS, by certain articles of agreement, bearing even date with the above written bond or obligation, and made, or expressed to be made, between the above-bounden A B of the one part, and the above-named E F of the other part, he, the said A B, for the considerations therein expressed, hath contracted and agreed with the said

E F to erect and build on a piece of ground situated at , certain houses, etc. [*describe the buildings*], in such manner and form, and at or within such time, as in the said articles of agreement and in a specification thereto annexed, and certain plans, elevations, and sections in the said specifications and articles referred to, are particularly mentioned and set forth; and whereas on the treaty for the said contract it was agreed that the said A B [*builder*] and C D [*surety*] should enter into the above-written bond or obligation, as an additional security to the said E F for the due performance of the said articles of agreement, and of all and every covenant, matter, and thing therein contained, on the part and behalf of the said A B, his executors or administrators, to be done and performed: Now the condition of the above-written bond or obligation is such that, if the above-bounden A B, his executors and administrators, do and shall erect and build, complete, and finish the said [*describe building*], in and by the said articles of agreement contracted to be erected and built, at and within the time therein expressed for completing the same, and also do and shall well and truly observe, perform, fulfil, and keep all and every the covenants, contracts, clauses, articles, and agreements contained in the said articles of agreement, and which, by or on the part of the said A B, his executors or administrators, are or ought to be observed, performed, fulfilled, and kept, within such time and in such manner, in all respects, as in the said articles of agreement are mentioned or required, according to the true intent and meaning of the said articles of agreement, and according to the aforesaid specification, plans, elevation, sections, and drawings therein referred to, then the above-written bond or obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

[SEAL.]
[SEAL.]

FORMS RELATING TO BUILDING LEASES.

No. 17. — *Agreement to Execute a Lease after the Erection of Buildings.*[1]

THIS AGREEMENT, made this day of , in the year one thousand eight hundred and , between A B and C D, both of the city of Baltimore and State of Maryland, —

[1] See Howard *v.* Carpenter, 11 Md. 259.

WITNESSETH, That the said A B has agreed, so soon after the said C D shall have erected the building hereinafter described, upon a lot of ground owned by the said A B in fee simple in said city, also hereinafter described, to execute and deliver to the said C D a sufficient lease for ninety-nine years, renewable forever, reserving a rent of $, payable in equal semi-annual payments of $ each, accounting from the day of in the year eighteen hundred and , with covenants and conditions in common use in leases for ninety-nine years, renewable forever, in said city,[1] of all that lot of ground situated and lying in said city of Baltimore and thus described; that is to say [*full description of the property agreed to be leased*]:

And this agreement further witnesseth that, in consideration of the premises, the said C D hereby agrees to erect on the said lot, in a good, substantial, and workmanlike manner, a story brick building, feet front and feet deep, with a mansard roof and back building (etc.), to be completed on or before the day of , in the year eighteen hundred and .

Witness our hands and seals, the day and year first above written.

A B. [Seal.]
C D. [Seal.]

No. 18. — *Another Form of Agreement for a Lease.*

THIS AGREEMENT, made this day of in the year one thousand eight hundred and , between A B, of the city of B , of the first part, and C D, of the same place, of the second part, —

WITNESSETH, That the said A B agrees to grant, and the said C D to take, a lease, by indenture, of all that messuage [*tenement, lot, premises, piece or parcel of land, as best describes the property intended*], with the appurtenances in any wise appertaining thereto, for the term of years, to commence and be computed from the day of , 18 , at the yearly rent of $, to be paid in half-yearly instalments of $ each on the day of and of each year during the term, without any deduction or abatement on any account whatsoever; the first half-yearly payment to be made day of next. And it is hereby declared and agreed that in such lease, when made, shall be contained the following covenants: —

[Here fully describe the provisions intended to be included in the

[1] Leases can no longer be made irredeemable in Maryland. Act 1884, ch. 485.

lease.[1] Some covenants, such as to pay rent or taxes, repair or insure, may be briefly mentioned, while covenants to build and complete dwelling, etc., by a time specified, to furnish security for said completion, are set forth in full. It is generally advisable to avoid leaving for implication certain covenants by using the uncertain terms, "all the usual covenants," and such like.]

No. 19. — *Conditions for Leasing Lots.*[2]

CONDITIONS for leasing lots of ground on the north side of and , etc., in the city of , etc., shown on the accompanying plan.

1. The builders are to erect good and substantial brick or stone messuages or tenements, in strict accordance with block and other plans and elevations, figured in detail, and specifications, to be submitted to and approved by the land-owner, or his surveyor or agent for the time being, in writing, before any of the buildings are commenced.

2. Every block plan shall show the exact site of every house, and the walls or fences separating the plot on which each house is to be erected.

3. Each of the messuages or tenements is to be erected and covered in within calendar months from the commencement of the building of each such messuage, and finished and completed within calendar months next thereafter, and the whole of the houses to be erected upon the said ground are to be completed within years from the commencement of the term.

4. The builders are to make and construct such drainage and other works connected with the public sewer or otherwise as may be directed by the land-owner or his agent.

5. The builders are to form and construct the footh-path in front of the said house as soon as each house is completed, as directed and approved by said owner or his agent.

6. All boundary walls or fences are to be approved by the land-owner, or his surveyor or agent.

[1] For form of covenants, see those given *post*, form 24.

[2] Lot-owners may offer their lots for sale under any condition they desire, provided there are no conflicting statutory regulations. The terms for which leases may be made are subject to statute law in many of the States.

7. The following rents are to be reserved by the land-owner out of each of the lots; that is to say [*give full particulars*].

8. The terms of the leases are to be for ninety-nine years, renewable forever [*or as the case may be*].

9. The land-owner reserves to himself and his agents the right to enter upon the land, and use so much of any of the plots as may be necessary for making roads and sewers [*or other privilege*].

10. The builders are to contribute towards the cost of making roads and sewers at the rate of $ per foot frontage for all land abutting upon said roads.

11. The builders shall maintain and keep in repair the road and foot-paths, or, at the option of the land-owner, pay such sum of money in lieu thereof, from time to time, as the said land-owner or his surveyor may direct, unless and until such roads be, with the consent of the land-owner, dedicated to the public.

12. The builders shall pay the land and all other taxes, rates, duties, and assessments of every description, now or hereafter to be imposed on the premises, or on the landlord or tenant thereof.

13. The builders will be required to furnish security approved by the land-owner for the due performance of their contract.

14. Separate leases will be granted to the builders or their nominees, at such apportioned rents as the land-owner or his agent may deem reasonable, or otherwise be agreed upon.

15. The builders will be required to give all the necessary notices, and procure such permits as may be exacted by the public authorities.

16. The land-owner does not bind himself to accept the highest or any offer which may be received.

To Mr. , *owner of lots above described:*

I hereby offer to take a lease of the plot of ground shown on the plan aforesaid, for the term of years, and subject to the covenants and conditions, and in accordance with the form of lease mentioned, at the yearly rent of $.

Dated this day of , 18 . [Signed,]

No. 20. — *Renewable Lease for Ninety-nine Years.*[1]

THIS LEASE, made this day of , in the year eighteen hundred and , between A B, of the city of Baltimore and State of Maryland, of the first part, and C D, of the same place, of the second part, —

[1] Particularly common in Maryland.

FORM OF NINETY-NINE YEAR LEASE.

WITNESSETH, That the said A B, in consideration of the payment of the rent hereinafter expressed to be paid, does hereby demise and lease unto the said C D, his personal representatives and assigns, all that piece or parcel of ground situate and lying in Baltimore city and thus described, that is to say, beginning, for the same [*full description of the property*].

Together with the improvements thereon, and the rights and appurtenances thereto belonging or in any wise appertaining.

To have and to hold the above demised property unto the said C D, his personal representatives and assigns, for the term of ninety-nine years, beginning on the day of the date of these presents, he, the said C D, his personal representatives or assigns yielding and paying therefor, in each and every year during the continuance of this demise, unto the said A B, his heirs or assigns, the rent or yearly sum of dollars, payable in equal half-yearly instalments accounting from the day of , eighteen hundred and , over and above all deductions for taxes and assessments of every kind levied or assessed on said demised property, or the rent issuing therefrom.

Provided, that, if the said rent shall be in arrear, in whole or in part, at any time, then it shall be lawful for the said A B, his heirs or assigns, to make distress therefor.

And provided, also, that if the said rent shall be in arrear in whole or in part for sixty days, then it shall be lawful for the said A B, his heirs or assigns, to reënter upon the hereby demised property, and hold the same until all arrearages of rent thereon, and all expenses incurred by reason of such non-payment, shall be fully paid.

And provided, further, that if the said rent shall be in arrear for six months, then the said A B, his heirs or assigns, may reënter upon the property hereby demised and hold the same, as if this lease had never been made.

And the said C D, for himself, his personal representatives and assigns, hereby covenants with the said A B, his heirs and assigns, to pay the aforesaid rent, taxes, and assessments when legally demandable.

And the said A B, for himself, his heirs and assigns, hereby covenants with the said C D, his personal representatives and assigns, that on payment by the said lessee, his personal representatives and assigns, of said rent, and the performance of all covenants herein on his or their part to be performed, he, the said A B, will warrant specially the property hereby demised, and that he will execute such other and further assurances as may be requisite; also, that, at any time during

this demise, the said A B, or his heirs or assigns, will, on payment to him or them of the sum of ten dollars as renewal fee, execute and deliver, or cause to be executed and delivered, to the said C D, his personal representatives and assigns, at his or their request, a new lease of the above demised property for another term of ninety-nine years, to commence on the expiration of this lease, subject to the same rent and containing the same covenants, so that the demise hereby created may be renewable and renewed from time to time forever; also, that at any time after the expiration of fifteen years, accounting from the day of the date of these premises, during the continuance of this demise, on the payment of the sum of money equal to the capitalization of the rent hereby reserved, at the rate of four per cent. per annum, to wit, the sum of dollars, in gold coin of the United States, or its equivalent, with all rents accrued and unpaid, and with a *pro rata* part of the accruing six months' rent, at the cost of the said C D, the aforesaid property shall be released and discharged from the payment of the aforesaid rent and all the covenants herein contained, by a deed sufficient for that purpose.[1]

Witness their hands and seals, the day and date first above written.

A B. [Seal.]
C D. [Seal.]

No. 21. — *A Lease for a Term of Years: Maryland Statute Form.*[2]

THIS LEASE, made this day of , in the year eighteen hundred and , between A B and C D, WITNESSETH: That the said A B doth lease unto the said C D, his personal representatives and assigns, all that, etc. *describing property*], for the term of years, beginning on the day of , in the year eighteen hundred and , and ending on the day of , in the year eighteen hundred and , the said C D paying therefor the sum of dollars on the day of in each and every year.

Witness their hands and seals.

A B. [Seal.]
C D. [Seal.]

[1] By Act 1884, ch. 485 (Md. Stat.), covenants of redemption have to be inserted in all leases, giving lessee right to redeem at a capitalization of not less than four per cent.

[2] Maryland Rev. Code, art. 44, § 66.

No. 22. — *Building Lease:*[1] *A General Form.*

THIS INDENTURE, made, etc., between A B, etc., of the one part, and C D, of the other part, WITNESSETH, —

That the said A B, for and in consideration of the rents, covenants, and agreements hereafter reserved and contained, by and on the part and behalf of the said C D, his executors, administrators, and assigns, to be paid, done, and performed, hath demised, leased, set, and to farm let, and by these presents doth demise, lease, set, and to farm let, unto the said C D, his executors, administrators, and assigns, all that piece or parcel of ground situate, lying, and being on, etc., in said , containing in breadth on the north side thereof , and in depth on the east side thereof , be the same more or less, and on the west side thereof , east and from thence south , and thence east, be the same more or less; together with the messuages or tenements, and other the erections and buildings thereon, which the said C D shall have full liberty to pull down, and take to and for his own use; which said piece or parcel of ground abuts north on aforesaid, south on gardens to some houses on the north side of , belonging to the said A B, now on lease to , east on buildings, etc., and west, etc., is more fully delineated and described in the plan or ground-plat thereof, in the margin of these presents; together with all erections and buildings to be erected and built thereon, and all ways, paths, passages, drains, water, water-courses, easements, profits, commodities, and appurtenances whatsoever, belonging and which shall belong to the said hereby demised premises, or any part or parcel thereof: to have and to hold the said piece or parcel of ground, messuages, or tenements, erections, buildings, and premises hereby demised, or intended so to be, with their and every of their appurtenances, unto the said C D, his executors, administrators, and assigns, from the day of last past, before the date thereof, for and during and unto the full end and term of years from thence next ensuing, and fully to be complete and ended (with right of renewal if desired): yielding and paying therefor, for the first year of the said term hereby demised, the rent of a peppercorn on the last day thereof, if demanded, and yielding and paying therefor yearly and every year, for and during the remaining years of the term hereby demised, unto the said A B, his heirs and assigns, the yearly rent or sum of $ of lawful money of the United States, by half-yearly payments on the and in each year, by even and

[1] 2 Taylor L. & T. 461.

equal portions, the first payments thereof to begin and be made on , in the year of our Lord , the said several rents to be paid and payable from time to time on the several days aforesaid during the said term, free and clear of all rates, taxes, charges, assessments, and payments whatsoever, taxed, charged, assessed, or imposed upon the said hereby demised premises, or any part thereof, by any lawful authority howsoever, during the term hereby granted.

[Here may follow covenants by lessee to pay rent, to pay taxes, to erect houses, to keep the same in repair, and not to use for purposes of offensive trades, to surrender at the end of the term, to keep the premises insured, to rebuild in case of fire, to permit the lessor to examine the premises; proviso for reëntry for a breach of any covenant on the part of the lessee, and by the lessor for quiet enjoyment of each of these covenants. Forms will be given later on.[1]

No. 23. — *Deed of Assignment of a Leasehold Estate.*

This Deed, made this day of , in the year eighteen hundred and , by A B, of the city of Baltimore and State of Maryland, Witnesseth, —

That in consideration of the sum of dollars, the receipt whereof is hereby acknowledged, the said A B does hereby grant and assign unto C D, of , his personal representatives and assigns, all that piece or parcel of ground situate and lying in said city of Baltimore and described as follows, that is to say: Beginning, for the same [*fully describing the property*], being the same piece or parcel of ground which, by lease dated the day of and recorded in , was demised and leased unto the said A B by E F for the term and at the rental therein expressed.

Together with the improvements thereon, and the rights and appurtenances thereto belonging or in any wise appertaining.

To have and to hold the above-granted property unto the said C D, his personal representatives and assigns, during all the residue of the term of years yet to come and unexpired therein, with the right and benefit of renewal of said term forever; subject, however, to the payment of the annual rent of $ reserved in the aforesaid lease, to whomsoever the same may be payable, in equal semi-annual instalments, on the first days of and in each and every year.

And the said A B hereby covenants that he will warrant specially

[1] *Post*, No. 24.

the property hereby conveyed, and that he will execute such further assurances of said land as may be requisite.

Witness the hand and seal of the said grantor the day and date first above written.

Attest: A B. [Seal.]

No. 24. — *Covenants which may be used in Leases.*[1]

1. And the said lessee doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor that he, the said lessee, his executors, administrators, and assigns, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever. To pay rent.

2. And also will pay all taxes, rates, duties, and assessments whatsoever, whether parochial, parliamentary, or otherwise, now charged, or hereafter to be charged, upon the said demised premises, or upon the said lessor on account thereof (excepting the land-tax, and all such other taxes, rates, duties, and assessments, or any portion thereof, which the lessee is or may be by law exempted from). To pay taxes.

3. And also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when, where, and so often as the same may need be. To repair.

4. And also that the said lessee, his executors, administrators, and assigns, will, in every year in the said term, paint all the outside wood-work and iron-work belonging to the said premises with two coats of proper oil colors, in a workmanlike manner. To paint outside every year.

5. And also that the said [*lessee*], his executors, administrators, and assigns, will every year paint the inside wood, iron, and other work now or usually painted, with two coats of proper oil colors, in a workmanlike manner; and also repaper, with paper of a quality as at present, such parts of the premises To paint and paper inside every year.

[1] 2 Platt on Leases, 580; 2 Taylor L. and T. 428.

as are now papered; and also wash, stop, whiten, or color such parts of said premises as are now plastered.

6. And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, administrators, and assigns, and the said lessee, his executors, administrators, and assigns, shall keep the same so insured during the said term, and will, upon the request of the said lessor or his agent, show the receipts for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sum or sums of money which shall be recovered or received by the said lessee, his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt or damaged by fire as aforesaid.

To insure.

To rebuild in case of fire.

7. And it is hereby agreed, that it shall be lawful for the said lessor, or his agents, at all reasonable times during the said term, to enter the said demised premises to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the premises; and further, that all wants of reparation which upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators, and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly.

Lessor to enter to repair.

8. And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises, or any part thereof, into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used otherwise than as a private dwelling-house, without the consent of the lessor.

Premises not to be used as a shop.

9. And also that the said lessee shall not nor will during the said term assign, transfer, or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said lessor, his executors, administrators, or assigns, first had and obtained.

Not to assign.

10. And further, that the said lessee will, at the expiration or other sooner determination of said term, peaceably surrender and

yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted. To leave premises in good repair.

11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, and assigns, then, and in either of such cases, it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof in the name of the whole, to reënter, and the same to have again, repossess, and enjoy, as of his or their former estate, anything hereinafter contained to the contrary not excepting. Proviso for reëntry.[1]

12. And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him or them or any of them. Covenant for quiet enjoyment.

13. And that he, the said lessee, his executors, administrators, or assigns, shall and will, at his or their own expense, from time to time insure, or cause to be insured, and during the said term keep insured, every additional building which may hereafter, with such approbation as is hereinafter mentioned, be built on the same ground hereby demised, or any part thereof, and effect the same within six days after each such building shall be built or covered in, or within six days after such earlier period at which the said [lessee], his executors, administrators, or assigns, shall be required by lawful authority; and will increase the amount of such insurance, respectively, when and as each such building shall be com- To insure new buildings.[2]

[1] See, also, proviso for non-payment of rent, ninety-nine year leases, *ante*, form No. 20.

[2] 2 Platt, 611.

pleted, so as to make the sum insured thereon equal to three fourth parts, at least, of the then value thereof.

14. That he, the said lessee, his executors, administrators, or assigns, will, within the first three years of the said term hereby granted, lay out and expend the sum of $, at least, in and upon the substantial repair of the said demised premises, and every part thereof; the application of the said sum, and the said reparation of the said premises as aforesaid, to be from time to time surveyed, inspected, and approved by such proper person or persons as the said lessor, his heirs, or assigns, shall appoint and direct to survey and inspect the same; and also that he, the said lessee, his executors, administrators, and assigns, will, when required, produce and deliver to the said lessor, his heirs or assigns, the bills and receipts of the different tradesmen employed in doing such repairs as aforesaid for the respective sums to be paid them for that purpose, or duplicates thereof.

To expend a fixed sum in repairs.

15. And also that he, the said lessee, his executors, administrators, and assigns, shall and will from time to time, during the said term, pay a reasonable share of the charges of making, repairing, and cleansing all party-walls, fences, sewers, drains, gutters, and other easements belonging, or which shall belong, to the said premises hereby demised, in common with the owners or occupiers of any adjoining premises.

To share expense of repairing, sewers, etc.

16. And that he, the said lessee, his executors, administrators, and assigns, shall not, by building or otherwise, stop or obstruct any light or lights belonging to any messuage or tenement, the estate or interest whereof in possession or in reversion is in .

Light.

17. And also that the said lessee, his executors, administrators, and assigns, will not, at any time or times during the said term, permit any way or thoroughfare over or through any part of the said premises hereby demised.

No thoroughfare.

18. That in case the said premises hereby demised, or any part thereof, shall at any time or times during the continuance of this demise happen to be damaged or destroyed by fire, he, the said lessor, his heirs or assigns, will, with all convenient speed, repair or rebuild the same premises which shall or may happen to be damaged or destroyed by fire as aforesaid, and make the same fit for the habitation of the said lessee, his executors, administrators, or assigns.

To rebuild or repair in case of fire.

Forms of other covenants are given by Mr. Platt,[1] *i. e.* to procure

[1] 2 Platt on Leases, 613 *et seq.*

supply of water from a particular company, for lessee to purchase his porter from the lessor, that lessor shall have a watercourse through the demised premises, not to assign or underlet, to keep lawn and garden in order, not to make hedges, to provide reed for thatching, to find timber for repairs, etc.

The following stipulations, covenants, etc., may also be used in building leases, or agreements for such: —

1. *Power of Entry to Intended Lessee.* During the period of from the date hereof, the said , lessee, for the purpose only of building or constructing the houses, etc., in the manner and to the extent hereinafter described, may enter upon the plots or pieces of land situate at , fronting on the [*description*], which are shown on the plan hereunto annexed, etc.

2. *Time for Building.* The lessee will, within months from the date hereof, at his own expense, erect, cover in, and fit for occupation, on the lot or parcel of ground described in this lease [*or agreement*] thirteen dwelling-houses, with pressed-brick fronts, three stories high, with back buildings two stories high, etc., with suitable drains, areas, gardens, sewers, walls, fences, pathways, curbs, and pavings, as shown on accompanying plans, and marked, etc.

3. *Work to be Approved by the Land-Owner.* The lessee will construct or build, cover in, and complete fit for habitation and use, the said houses, with out-buildings, vaults, areas, gardens, sewers, drains, walls, fences, footways, pavings, etc., upon the said plots or pieces of land, in a good, substantial, and workmanlike manner, with fit and proper materials, and in all respects in conformity with the specification hereunder written, and to the satisfaction of the land-owner, his architect or surveyor, and under his direction and inspection, and according to plans, sections, elevations, and detail drawings thereof, which have been signed by the parties hereto, and a copy whereof has been deposited with the architect or surveyor of the land-owner.

4. *Lessee Restricted in the Use of the Land.* The lessee shall not, during the continuance of this demise [*or agreement*], carry on, or permit to be carried on or committed, on any part of the premises comprised in this agreement, or in any of the buildings or erections thereon, whether affixed to the land or not, the business of making bricks, or any trade, business, or manufacture or occupation whatsoever, or any nuisance; nor use or allow the premises described in this instrument of writing, or the buildings thereon erected, to be used for any purpose of public amusement, or for any other purpose

whatsoever than strictly for the purpose of this agreement [*or lease*], and as private dwelling houses.

5. *As to Excavations.* The lessee shall not dig or allow to be dug out, deeper than required for the several buildings and drains, any part of the several lots or parcels of land, nor for the road hereinafter to be mentioned; and no earth, clay, sand, loam, or gravel dug out shall be sold or disposed of, nor shall any be removed from the premises, excepting such as is necessary to remove for the proper performance of the work.

6. *As to Insurance.*[1] The lessee will, as soon as the house is covered in as aforesaid, insure, in some reputable insurance company to be approved of by the land-owner, for at least [*two thirds*] of the value of such house, and shall keep the same so insured during the term for which the property is hereby [*or shall be*] demised.

7. *Separate Lease to be given if desired.* The land-owner will, from time to time, at the expense of the lessee, as hereinafter mentioned, when and as often as any of the houses so to be built upon the pieces or lots of land shown on the plan shall have been erected and covered in as aforesaid, and the drains and sewers therefrom shall have been formed, in the manner and to the satisfaction of the lessor, his architect or surveyor, and in all respects according to this agreement [*or lease*], grant, or cause to be granted, to the lessee or his nominee, a lease of such house or houses, and of the site thereof, and of the intended yards, gardens, etc., such lease to be for the term of years, and to contain the several exceptions, reservations, covenants, conditions, and provisions hereinafter specified.

8. *Where an Agreement to Lease only is intended.* These presents are intended to operate as an agreement only, and not as an actual demise of the premises herein described, and shall not give the lessee any legal interest in any part of the said premises until the lease of such part shall be executed, except so far as to create a strict tenancy at will on the part of the lessee upon the terms aforesaid, and to entitle the lessor to the like power and remedy by distress or otherwise for the recovery of the rent or respective rents to become due under these presents, as if the lease or leases had actually been granted.

9. *To Build a Row of Houses.* And that he, the lessee, his executors, administrators, or assigns, shall and will, under the direction and inspection of the said lessor, his architect or agent, and at his and their own costs and charges, well and substantially build dwell-

[1] See *ante*, pp. 438, 448, Covenants, Nos. 6 and 13.

ing-houses in one continued line or row upon the part or parcel of the land herein described [*description*], according to the plan, elevations, and sections; and that each of the said houses shall be built in a uniform manner, so as to be in a line with the other dwelling-houses or shops respectively built or intended to be built on the pieces or parcels of ground as shown in the plan, so that the windows of every story of the said dwelling-houses shall be in a line with the windows of the several dwelling-houses or shops, etc.

10. *To Make the Walls of a Certain Thickness.* And the said lessee will build the fore and rear fronts to the said dwelling-houses and shops, to the top of the cellar floor, with stone of inches thickness, the first and second stories with [*state number*] bricks in thickness, the third story of bricks in thickness, and the garret with bricks in thickness, and the partition walls between the houses with bricks in thickness, at least to the top of the cellar-story, and from thence to the, etc.; and will, in the brick-work of the front, use hard-pressed brick, etc.; and all other bricks used shall be [*describing them*] good and sufficient, well-burnt bricks, and the mortar well wrought and tempered, and made of good fresh lime, mixed, etc.

No. 25. — *License to Enjoy Light.*[1]

WHEREAS, I, , of , in the county of , have lately opened windows or lights from my shop or premises in aforesaid, which face into or overlook the back yard or grounds of a dwelling-house and premises of of , now I do hereby declare that the windows or lights above mentioned are and remain open and unblocked upon the leave and indulgence of the said , and that I will, upon the request of him or his executors, administrators, or assigns, to be made at any time hereafter, wall or block up the same; and in the mean time, until such request is made, as aforesaid, I hereby promise, in consideration of such indulgence, to pay unto the said , his heirs, executors, administrators, or assigns, the sum of $ yearly and every year, to commence and take effect from the day and date hereof.

[Signed,]

Dated the day of , 188 .

Witness,

[1] Emden on Buildings, 659; see Bewley *v.* Atkinson, L. R. 13 Ch. D. 283.

No. 26. — *Reservation of Passage of Water.*[1]

Except and always reserved unto the said [*lessor*], his heirs, executors, administrators, or assigns, and the lessees and occupiers for the time being of any other building, lands, or grounds held of or belonging to the said [*lessor*], the free passage of water and soil coming or to come off from any other buildings, lands, or grounds of the said [*lessor*] through the channels, sewers, drains, and water-courses now belonging to, or which shall hereafter belong to, or which shall hereafter be made in, upon, through, or under the said premises hereby demised; such lessees and occupiers for the time being, on reasonable request, paying their respective proportions of cleansing and repairing the said channels, sewers, drains, and water-courses, as often as need shall require.

No. 27. — *Conditions for Architectural Competition.*[2]

1. Architects willing to compete may send in plans and specifications before to , from whom any further information may be obtained.

2. All except the working drawings of details on a larger scale are to be on the scale of $\frac{1}{8}$ in. to a foot, and the longest vertical lines in the perspective drawings are to be on that scale also. The drawings are to be made from as distant a point of view as possible (which distorts them less), and there are to be no figures or other imaginary objects in the foreground; and they are either all to be or all not to be colored. All depths of windows, and other shadow-casting parts, and all thicknesses, are to be accurately represented in the perspective drawings, and figured legibly on the plans and sections, and all inscriptions on the drawings are to be written in plain letters without lines.

3. No part of the work that can be defined by drawings or specification is to be provided for by a sum of money named in the specification.

4. The plans and specifications are to include [*according to local circumstances*] all the necessary drainage, heating [*there are generally special tenders for heating apparatus*], bells, grates, chimney-pieces, closets and shelves, provision for gas-pipes, boundary walls and pavements, and everything, except furniture, that will be requisite to fit the building for its purposes.

[1] 2 Platt on Leases, 595.

[2] Beckett on Building, 14.

5. The estimate for the whole work is not to exceed $, but any architect who considers this insufficient for the proper execution of the work required may say so, and send in his own estimate either before or with his plans.

6. The committee will not be bound to accept any plan, nor to proceed with any one which they do accept, unless they find that a contractor with sureties in one third of the amount of the estimate to be approved by them will undertake it for that sum. If no such contract can be made to their satisfaction, the whole proceeding is to be void, and the architect is to have no claim upon them.

[*The conditions of payment, either for drawings or employment, may, of course, be anything the employer pleases to announce.*]

FORMS RELATING TO MECHANICS' LIENS.

No. 28. — *Maryland: Form of a Mechanic's Lien.*

JOHN DOE
vs.
RICHARD ROE. } *In the Superior Court of Baltimore City.*

John Doe, of the city of Baltimore, a brick-maker, claims the sum of two hundred dollars, with interest thereon from the second day of July, 1887, to be due him against all those four buildings situated in said city, each of them two stories in height, and having a front on Street of about feet and six inches, with a depth of about ninety feet to an alley [and any other facts to further identify the property], and against the ground covered by the said buildings, and so much other ground immediately adjacent thereto, and belonging in like manner to the owner of such buildings, as may be necessary for the ordinary and useful purposes of said buildings, the whole of which ground is described as follows, viz.: —

Beginning for the same at the corner of Street and Avenue, and running thence southerly, bounding on the west side of Street fifty-eight feet to the centre of the partition wall there being; thence westerly through the centre of said partition wall to the end thereof, and continuing the same course, in all ninety feet, to the east side of an alley ten feet wide there being; thence northerly, bounding on the east side of said alley fifty-eight feet to the south side of Avenue, and thence bounding on the south side of Avenue ninety feet to the place of beginning (being the firstly, secondly, thirdly, and

fourthly described lots described in a lease from John Black to said Richard Roe, recorded in Liber J. B., No. , folio , of the land records of Baltimore city), of which said ground, and buildings thereon, the said Richard Roe, at the time of furnishing the work and materials hereinafter mentioned, was the owner or reputed owner. The said claim being for work done and materials furnished by the lienor for, or about the erection and construction of, the said buildings at the instance and request of the said owner or reputed owner, at the particular time, and of the nature or kind and amount, and for the prices, set forth in the Bill of Particulars hereto annexed; *and which work has been finished and materials furnished within less than six months before the filing of this claim.* And the said lienor designates the sum of fifty dollars as the amount he claims to be due him on each of said buildings.

Wherefore the said John Doe directs the clerk of the Superior Court to file and record this claim as a lien as well against the said ground and buildings thereon as against the said Richard Roe, as the owner or reputed owner thereof, agreeably to the provisions of the Code of Public General Laws. JOHN DOE.

A. P. L., *Attorney for Lienor.*

[To this Form must be appended a bill of particulars.]

No. 29. — *Form of Notice to Owner.*[1]

BALTIMORE, July 5, 1887.

Mr. JNO. WHITE:

Dear Sir, — I desire to notify you that I intend to lay a lien, as allowed by the provisions of the law relating to mechanics' liens, against all those four three-story brick dwellings, with two-story back buildings, located on the west side of Street, beginning at the corner of Street, and having an even depth of feet, and against the ground upon which said buildings have been erected, and so much adjacent thereto and used in connection therewith as necessary for building purposes, and of which you are the owner or reputed owner. I intend to claim the sum of two hundred dollars, and designate the sum of fifty dollars against each of said houses and lots for bricks fur-

[1] In cases where the work is done or materials furnished to a person other than the owner of the buildings or his agent, written notice must be given to the owner of the intention of the claimant to lay the lien. See §§ 11, 12, Md. Code, Public General Laws, art. 67.

nished by me within the last sixty days to John Black, the builder or contractor, for use in constructing said buildings. The property I herein refer to is more fully described in a deed to you from James Brown, recorded in Liber J. B., No. , Folio No. , etc., Baltimore City Land Record.

I inclose herewith an itemized statement of my claim, containing the dates the materials were furnished to John Black, the builder.

Very respectfully, JOHN DOE.

A. P. L., *Attorney.*

No. 30. — *New York: Contractor's Notice to Owner.*

JAMES BROWN, *Contractor,*
vs.
RICHARD ROE, *Owner,*
and
JOHN DOE, *Lienor.*

Notice of Contractor to foreclose or enforce the Lien.

Notice of the above-named James Brown, contractor, to Richard Roe, owner of the hereinafter described building and appurtenances and lot on which the same stand; and to John Doe, who has filed a lien thereupon.

This is to give notice that I, James Brown, residing at No. 109th Street, in the city of New York, within three months after the hereinafter described work was done, to wit, on the 22d day of August, 1887, filed with the clerk of the city and county of New York the notice required by Act of May 5, 1863, section 6, claiming a lien upon that building and appurtenances situate on 91st Street, and known as No. of said street, and upon the lot on which the said building and appurtenances stand, which said lot and premises are situate on said 91st Street, and are known and described on the maps open to the public as [*describing lot*], for the sum of dollars, for labor performed towards the erection of the building aforesaid, in pursuance of the terms of the contract made between you, the said Richard Roe, and myself, the said James Brown, and which said lien is hereby claimed as aforesaid.

You, and each of you, will therefore take notice that you are required to appear and join in the said proceedings before this court, at o'clock, on the day of , 1887; and in default thereof the said James Brown will move the court to enter judgment against you for the sum of dollars, and interest thereon, from the day of , 1887, with costs on account of the claim aforesaid, and said

judgment may be enforced by execution on the said building and appurtenances, and the lot on which they stand.

Witness my hand, this 29th day of August, 1887.

JAMES BROWN.

PETER GILLYN, *Atty. for Claimant.*

No. 31. — *New York: Lien of Contractor under Chapter* 500, *Laws of* 1863.

To ——, *Clerk of the City and County of New York:*

SIR, — This is to give notice that I, James Brown, residing at No. 109th Street, in the city of New York, do claim a lien upon that building and appurtenances situate on 91st Street, in said city, and known as No. on said street, and upon the lot on which the said building and appurtenances stand, which said lots and premises are known and described on the maps open to the public as [*describing lot*], for the sum of dollars, now due for laying the brick and masonry of said building, towards the erection of the said building, in pursuance of the terms of a contract made between Richard Roe, who is the owner of said building and appurtenances, and the lot upon which the same stands, and the claimant hereof, the said sum being due from the said Richard Roe, as owner aforesaid, to me, the said James Brown, as contractor; that three months have not yet elapsed since the said work was done.

Witness my hand, this 22d day of August, 1887.

JAMES BROWN, *Claimant.*

PETER GILLYN, *Attorney for Claimant.*

[To be sworn to by the contractor, and jurat affixed.]

No. 32. — *Pennsylvania, Act of June* 16, 1836: *Lien Claim of Sub-Contractor.*

JOHN DOE
vs.
RICHARD ROE, *Owner*,
and
JAMES BROWN, *Contractor.*

In the District Court of the City of Philadelphia.

This is to give notice that the said John Doe hereby files his claim, or statement of his demand, in the office of the prothonotary of the District Court of the city of Philadelphia, State of Pennsylvania, to

secure the payment of the debt hereinafter mentioned, contracted for work done [*or materials furnished*] for and about the erection and construction of the building hereinafter described, which said debt is claimed to be a lien against the said building and the ground covered by the same, and against so much other ground immediately adjacent thereto, and belonging to Richard Roe, owner of said building, as may be necessary for the ordinary and useful purposes of the same; and sets forth, —

1. That John Doe is the name of the party claimant, and that Richard Roe is the name of the owner, or reputed owner, of the building; and that James Brown is the name of the contractor of the said building, with whom the said John Doe contracted to perform the hereinafter mentioned work.

2. That the amount claimed to be due is ninety-seven dollars; the nature of the work done was the general carpentering work for and about the erection and construction of said building, within six months past, the particular items, amounts, and time when said work was done being set forth in a bill of particulars hereto annexed as a part of this claim.

3. That the said building is known as No. Girard Avenue, and is located on that lot of ground described as follows, that is to say: [*full and definite description.*] The said building is about fifteen feet front, with an even depth of fifty-five feet; consists of a three-story front with a two-story back building; and is constructed of brick, and designed as a store.

Witness my hand, this 10th day of August, 1887.

JOHN DOE, *Claimant.*

PETER GILLYN, *Attorney for Claimant.*

[To this Form must be appended a bill of particulars.]

No. 33. — *Pennsylvania: Petition of Contractor to have Boundaries designated.*

To the Honorable the Judges of the District Court of the City of Philadelphia:

The petition of James Brown respectfully shows, —

That Richard Roe, of the city of Philadelphia, being the owner of a certain lot of ground situate in said city, and thus described, that is to say [*full and definite description*], commenced the erection of a brick dwelling-house thereon, without, previously to the commencement of the same, defining in writing the boundaries of the lot appur-

tenant to said building; that your petitioner is entitled to a lien thereon, by virtue of the provisions of the Act of June 16, 1836, for work done for and about the erection and construction of said building, for the sum of four hundred dollars.

Wherefore your petitioner prays the court to appoint competent and skilful persons as commissioners to designate the boundaries aforesaid, in conformity to the said act.

Witness my hand, this 10th day of September, 1887.

JAMES BROWN.

WM. SQUOSE, *Attorney for Petitioner.*

[Here follows jurat of magistrate, for the petition must be sworn to.]

No. 34. — *Bond against Liens.*

KNOW ALL MEN BY THESE PRESENTS, That we, X Y and W Z, of the city of Baltimore, in the State of Maryland, are held and firmly bound unto A B, of the same place, in the sum of three thousand dollars, lawful money of the United States, to be paid to the said A B or to his certain attorney, executors, administrators, or assigns; to the payment whereof we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this day of in the year one thousand eight hundred and eighty-seven.

WHEREAS, K H, by indenture bearing even date with these presents and recorded among the Land Records of Baltimore City, conveyed and assigned to the said A B the piece or parcel of ground situate and lying on Avenue, in the city of Baltimore aforesaid, in that indenture particularly described, with the improvements and appurtenances, as by reference thereto will fully appear:

And whereas, for the purpose of securing, protecting, and indemnifying the said A B, his executors, administrators, and assigns, from and against all manner of damage, loss, or injury, he or they or any of them may suffer, sustain, or incur for or on account of any lien or liens now existing, or which may be brought, exhibited, or filed against the said premises in said indenture described, under the lien laws of this State, within twelve months from the date of these presents, either for work or labor done or materials furnished in and about the erection of the house to be known as No. , and to be erected upon the fifth lot, reckoning from and to front about feet on Street, erected on the said ground, the said obligors have agreed to execute this bond:

Now, the condition of the foregoing obligation is such, That if the above-bounden obligors do and shall from time to time, and at all times hereafter, well and sufficiently protect, save harmless, and indemnify the said A B, his executors, administrators, and assigns, from and against all liens now exhibited or filed, or that may be exhibited or filed, within twelve months from the date hereof, against the said property and premises, or any part thereof, under the lien laws of Maryland, and from and against all loss, injury, damage, costs, charges, and expenses which the obligees, or any of them, may suffer, incur, or be put to, or pay for or on account, or by reason or in consequence of, any such lien or liens, or the enforcement or prosecution thereof, then the above obligation to be void and of none effect; otherwise to remain in full force and virtue in law.

Signed, sealed, and delivered in presence of

[Seal.]
[Seal.]
[Seal.]
[Seal.]

No. 35. — *Bond to Finish Buildings, to Indemnify against Liens, and to Pay Ground-Rents.*[1]

[Formal heading, etc.]

WHEREAS, for value received, the said A B has bargained and sold, by indenture bearing even date with these presents, and to be duly recorded among the Land Records of Baltimore City aforesaid, has granted and conveyed, to the said E F, his heirs and assigns, in fee simple, all that piece or parcel of ground situated and lying in the city of Baltimore aforesaid, in that indenture particularly described, with the improvements and appurtenances, and the yearly rent reserved thereout, under the lease thereof from the said A B to G H, as by reference thereto will fully appear:

And whereas, it was a condition precedent to the purchasing of said property by the said E F that he should be saved and protected against loss in the premises by the execution of this bond of indemnity, —

Now, therefore, the condition of the foregoing obligation is such that if G H, the lessee of said lots of ground, do and shall fully complete and finish the buildings and improvements now in the course of erection on said respective lots of ground, fence in said lots, lay the pavements, and put the grounds and premises in complete order for

[1] Carey's Forms, 342.

occupancy by tenants, on or before the day of next; and also that if the said A B, his heirs or assigns, shall promptly pay, or cause to be paid, any and every instalment of ground-rent [*and taxes if desired*] which shall fall due on said lots respectively under the said lease thereof, until such time as the said improvements shall be completed, and the premises made ready for occupancy as aforesaid;

And also if the said A B, his heirs and assigns, do and shall indemnify the said E F, his heirs and assigns, from and against any and every lien or liens now exhibited or filed, or that may be exhibited or filed within six months [*consult lien law limitation of the particular State*] from the completion of said improvements, against said property and premises under the lien laws of Maryland [*or other State*], either for work and labor done or materials furnished, and from and against all loss, injury, damage, costs, charges, and expenses which the said E F, his heirs, personal representatives and assigns, may suffer, incur, be put to, or pay for on account or by reason of, or in consequence of, any such lien or liens, or the enforcement thereof, — then the above obligation to be void; otherwise to remain in full force and operation of the law.

No. 36. — *Waiver or Release of Mechanic's Lien.*

THIS RELEASE of Mechanic's Lien, made this day of , in the year eighteen hundred and , witnesseth that, for the purpose of enabling A B to mortgage, sell, or otherwise dispose of all that property situate in the city of Baltimore on the side of Street, between and streets, being the house accounting from the side of Street, and about feet from Street, having a front on Street of about feet, and a depth of about feet, improved by building , with story back building , and for the further consideration of dollars, we, the undersigned, severally do waive and release all claims and liens which we now have or may hereafter acquire by virtue of the Code of Public General Laws of , amendments and additions thereto, against the said property, and our right to file a lien or liens on said property for work done and materials furnished by us in, on, or about the erection and construction of the buildings on the aforesaid property: it being understood, however, that we reserve our several rights, claims, and demands in the premise as against the said X Y, contractor and builder, personally.

Witness our hands and seals:

For Bricks,	[Seal.]	Plastering,	[Seal.]
Bricklaying,	[Seal.]	Plumbing,	[Seal.]
Carpenters' work,	[Seal.]	Sand,	[Seal.]
Factory work,	[Seal.]	Tin and Tinners,	[Seal.]
Gasfitting,	[Seal.]		[Seal.]
Hardware,	[Seal.]		[Seal.]
Lime and Hair,	[Seal.]		[Seal.]
Painting,	[Seal.]		[Seal.]
Paint, Oil, and Glass,	[Seal.]		[Seal.]
Lumber,	[Seal.]		[Seal.]

No. 37. — *Indemnity Bond.*

KNOW ALL MEN BY THESE PRESENTS, That we, X Y and W Z, of the city of Baltimore, in the State of Maryland, are held and firmly bound unto A B, of the same place, in the sum of dollars, lawful money of the United States, to be paid to the said A B, or to his certain attorney, executors, administrators, or assigns; to the payment whereof we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this day of in the year one thousand eight hundred and

WHEREAS, X Y hath this day contracted and agreed to and with said A B to furnish all necessary materials for, and to erect and construct in a good and substantial and workmanlike manner, a three-story double back building, in accordance with plans and specification by all the parties hereto subscribed, in the rear of house No. 175 Avenue, in said city, and to deliver the same according to contract, free from mechanics' liens, and from all injury and damage to adjoining property-holders, and the obligors have agreed to execute this bond of indemnity in the premises, —

Now, the condition of the foregoing obligation is such that, if the

above-bounden X Y and W Z do and shall keep harmless from all manner of damage, injury, suits, actions, costs, charges, and expenses which he or his representatives may suffer, sustain, or be put to, or pay for on account of, or by reason of, process or of liens attaching; and if the said X Y shall well and truly perform his contract in a substantial and workmanlike manner, and do and shall also well and sufficiently protect, save harmless, and indemnify the said A B, his executors, administrators, and assigns, from and against all loss, injury, damage, cost, charges, and expenses in the premises, — then the above obligation to be void and of none effect; otherwise to remain in full force and virtue in law.

Signed, sealed, and delivered in presence of

X Y. [Seal.]
W Z. [Seal.]
A B. [Seal.]

Schedule of Charges and Professional Practice of Architects, indorsed by the American Institute of Architects.[1]

For full professional services (including supervision), five per cent. upon the whole cost of the work.

For preliminary studies, one per cent.

For preliminary studies, general drawings and specifications, two and one half per cent.

For preliminary studies, general drawings, details and specifications, three and one half per cent.

For warehouses and factories, three and one half per cent. upon the cost, divided in the above ratio.

For works that cost less than $10,000, or for monumental and decorative work, and designs for furniture, a special rate in excess of the above.

For alterations and additions, an additional charge to be made for surveys and measurements.

An additional charge to be made for alterations or additions in contracts or plans, which will be valued in proportion to the additional time and services employed.

[1] Copy of official circular, signed by Thomas U. Walter, LL. D., president, and George C. Mason, secretary. Special contracts are usually made with architects in this country. The law, in cases where there has been no such contract made, will exact reasonable compensation rather than enforce the rules of any society or association.

Necessary travelling expenses to be paid by the client.

Time spent by the architect in visiting for professional consultation, and in the accompanying travel, whether by day or night, will be charged for, whether or not any commission, for office work or supervising work, is given.

The architect's payments are successively due as his work is completed, in the order of the above classification.

Until an actual estimate is received, the charges are based upon the actual cost.

The architect bases his professional charge upon the entire cost to the owner of the building when completed, including all the fixtures necessary to render it fit for occupation, and is entitled to a fair additional compensation for furniture or other articles designed or purchased by the architect.

If any material or work used in the construction of the building be already upon the ground, or come into possession of the owner without expense to him, the value of said material or work is to be added to the sum actually expended upon the building before the architect's commission is computed.

Drawings, as instruments of service, are the property of the architect.[1]

[1] "It is the opinion of the Board of Trustees of the American Institute of Architects that the supervision or superintendence of an architect, as distinguished from the superintendence of the clerk of the works, means such occasional inspection of a building in process of erection, or of other work, as the architect, personally or by deputy, finds necessary to insure its being executed in conformity with his designs and specifications or directions, and to enable him to decide when the successive instalments provided for in the agreements are due and payable. It includes, among his other duties, the exercise of authority to stop the progress of work condemned under it, to decide in constructive emergencies, and to order necessary changes."

AUTHORITIES UPON THE ART OF BUILDING.

In the cross-examination of witnesses, lawyers frequently find it advisable to thoroughly post themselves upon matters pertaining to the practical arts. In the trial of cases originating from Building Contracts, the testimony of mechanical experts can often be impeached by reference to standard authorities upon such matters. Therefore a brief reference to some of the works throwing light upon the art of building may be of value. For copious tables showing weight and strength of materials, wrought and cast iron columns, iron beams and girders, rivets, nails, spikes, nuts and washers, bolts, tubes and pipes for steam, gas, and water, boilers, strength of building-stones from various sections of the country, lime, cement, and concretes, window glass, gas service for lamps, weight of doors, valuation of carpenter's work, and general information, see Vogde's Architects' and Builders' Pocket Companion. Mr. F. E. Kidder, of Boston, has also published an admirable handbook giving similar tables and valuable data. An English work by Dr. Anderson, published by D. Appleton & Co., Philadelphia, on the Strength of Materials, contains a treatise on the physical properties of materials, descriptions of testing machines, with numerous tables as to strength and weight of cast and wrought iron beams and girders, timber, screws, roofs, and cranes. Other books may be mentioned: W. Allan on Theory of Arches; Aveling on Carpentry and Joinery; Barbon on Use of Steel; Beaton on Quantities; Buchan on Plumbing; Burgoyne on Blasting and Quarrying; Burn on Building Construction, 4 vols.; Burnham on Marbles; Campin on Iron Roofs, Materials, and Construction; Cristy on Joints; Collings on Handrailing; Cunningham's Earthwork Tables; Davies on Slate; Dobson on Art of Building, Bricks and Tile Masonry; Eassie on Wood and its Uses; Faija on Portland Cement; Fryer on Architectural Iron Work; Gillmore on Limes and Cements; Gould on Carpentry; Grandy's Timber Importers' Guide; Grant on Strength of Cement; Hammond on Bricklaying; Haskin on Clerk of Works; Horton's Complete Measurer; Hurst's Architectural Surveyors' Handbook; Joynson on Metals used in Construction; Laxton's Builders' and Con-

tractors' Tables (Bricklayers and Excavators); Merriman on the Mechanics of Materials; Miller's Builder's Price Book; Stock on Shoring and Underpinning; Tarn on Roofs; Tredgold on Carpentry; Walker on Brick-Work; Walsh on Brickmaking in Western India; De V. Wood on Resistance of Materials. The above, with innumerable works on Architectural and House Decorations, are usually found in the public libraries.

It is proper to note that these books treat their respective subjects from a scientific standpoint, and are not legal treatises.

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